

United States  
Circuit Court of Appeals  
For the Ninth Circuit. 8

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UNITED STATES OF AMERICA,  
Appellant,  
vs.

MARTHA La FAVOR, as Administratrix of Estate  
of CHARLES V. La FAVOR, deceased, and  
LUCY ANN La FAVOR,  
Appellees.

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Transcript of Record

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Upon Appeal from the District Court of the United  
States for the Western District of Washington,  
Southern Division.

FILED

MAY - 1 1934

PAUL P. O'BRIEN,

CLERK

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Circuit Court of Appeals  
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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ATTORNEYS OF RECORD

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Tacoma, Washington.

For Defendant:

ANTHONY SAVAGE,  
United States Attorney,  
Postoffice Building,  
Seattle, Washington.

TOM DeWOLFE,  
Assistant United States Attorney,  
Postoffice Building,  
Seattle, Washington.

In the District Court of the United States, Western  
District of Washington, Southern Division.

No. 8120

MARTHA M. LaFAVOR, Administratrix of the  
Estate of CHARLES V. LaFAVOR, Deceased,  
and LUCY ANN LaFAVOR,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

### THIRD AMENDED COMPLAINT.

Comes now the plaintiffs and for cause of action  
alleges:

#### I.

That the plaintiff, Martha M. LaFavor, administratrix of the Estate of Charles V. LaFavor, deceased, is a resident of Pierce County, Washington, and that she is the duly appointed, qualified and acting administratrix of the estate of Charles V. LaFavor, deceased; that said Charles V. LaFavor, deceased, died in Puyallup, Pierce County, Washington, on January 11, 1932; that the above entitled cause was pending at the time of his death and said Charles V. LaFavor was the original plaintiff herein; that the plaintiff, Lucy Ann LaFavor, is the mother of said deceased, and is the original beneficiary, named in the War Risk Insurance policy hereinafter described.

## II.

That in the month of October, 1917, desiring to be insured against the risks of war said Charles V. LaFavor, deceased, applied for a policy of war risk insurance in the sum of \$10,000.00, and thereafter there was deducted from his monthly pay the sum of \$6.40 per month, and subsequently thereto there was duly issued to him a policy of war risk insurance by the terms whereof the defendant agreed to pay said Charles V. LaFavor, deceased, the sum of \$57.50 per month in the event he suffered total and permanent disability while said policy was in full force and effect; that after his aforesaid discharge, the said Charles V. LaFavor, deceased, believing that said war risk insurance had [1\*] elapsed, made application and was granted reinstatement of \$3,000.00 thereof, that the original war risk insurance in the sum of \$7,000.00 is the only policy in question herein.

## III.

That about the month of January, 1918, said Charles V. LaFavor, deceased, contracted scarlet fever and pleurisy, and later in the month of September, 1918, in the Argonne Forests, France, said Charles V. LaFavor, was wounded from a fragment of a high explosive shell, and from concussion was thrown into a shell hole and partially buried causing a severe shock to his nervous system and complicated injuries to his spinal column, and as a re-

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\*Page numbering appearing at the foot of page of original certified Transcript of Record.

sult of the foregoing developed hypertrophic arthritis of the lumbar spine, causing partial paralysis of the left leg and caused internal injuries to his lungs, liver and heart, that as a result of the foregoing said Charles V. LaFavor was discharged as aforesaid totally and permanently incapacitated from following continuously any substantially gainful occupation by reason whereof he became entitled to receive from the defendant the monthly payments on \$7000.00 of the original war risk insurance, granted said Charles V. LaFavor, deceased, as provided in said policy of war risk insurance, in case of total and permanent disability.

#### IV.

That said Charles V. LaFavor, deceased, made due proof of said total and permanent disability to the defendant and had demanded payment of the aforesaid amount, but the defendant has disagreed with said deceased and has refused and still refuses to pay the same or any part thereof.

WHEREFORE, plaintiffs demand judgment against the defendant in the sum of \$7,000.00 and any additional amount or amounts that may be due under the terms of said policy of war risk insurance as plaintiff's respective interest may be, [2] together with their costs and disbursements herein.

A. W. NEWMAN  
Attorney for Plaintiff.

State of Washington,  
County of Pierce—ss.

Martha M. LaFavor, being first duly sworn on oath deposes and says: That she is one of the plaintiffs in the above entitled action; that she has read the foregoing third amended complaint, knows the contents thereof and believes the same to be true.

(Signed) MARTHA M. LaFAVOR

Subscribed and sworn to before me this 29th day of September, 1933.

[Notary Seal]

A. W. NEWMAN

Notary Public in and for the State of Washington,  
residing at Tacoma.

[Endorsed]: Filed Sep. 30, 1933. [3]

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[Title of Court and Cause.]

ORDER JOINING PARTY PLAINTIFF.

This matter coming on regularly for hearing on motion of E. C. Whitley, Special Representative for the Attorney General of the United States, and the Court having been advised in the matter, it is hereby

ORDERED that Lucy Ann LaFavor, mother of the deceased plaintiff herein, Charles V. LaFavor, be made a party plaintiff in the within action within five (5) days from the date of this order; or in the alternative it is

ORDERED that the said Lucy Ann LaFavor be joined herein by being made a party defendant and served in the usual manner.

Done in Open Court this 26th day of September, 1933.

(Signed) EDWARD E. CUSHMAN,  
Judge.

O.K.

A. W. NEWMAN,  
JOHN T. McCUTCHEON,  
Attorneys for Plaintiff.

[Endorsed]: Filed Sep. 26, 1933. [4]

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[Title of Court and Cause.]

ANSWER TO SECOND AMENDED  
COMPLAINT.

Comes now the United States of America, defendant, above named, by Anthony Savage, United States Attorney, Western District, Washington, Tom DeWolfe, Assistant United States Attorney, same district, and Joseph Mallery, Assistant United States Attorney, same district, and for answer to the plaintiff's second amended complaint, herein admits, denies, and alleges as follows:

I.

It is admitted that Charles V. LaFavor died January 11, 1932, and that the above entitled cause was pending at the time of his death, but denies that it has sufficient information or knowledge to form a belief as to the truth or falsity of the remaining allegations therein contained, and therefore denies the same.



II.

It is admitted that while in military service Charles V. LaFavor applied for and was granted a policy of War Risk Term Insurance in the amount of \$10,000 (ten thousand dollars), by the terms of which defendant agreed to pay said Charles V. LaFavor the sum of \$57.50 (fifty-seven dollars and fifty cents) per month in the event he died or suffered permanent and total disability while said policy was in full force and effect.

It is admitted that subsequent thereto said Charles V. LaFavor made application for and was granted reinstatement of \$3,000 (three thousand dollars) of the original \$10,000 (ten thousand dollars) insurance granted, and that the same was later converted and was in full force at the time of the insured's death. [5]

III.

For answer to Paragraph III of plaintiff's Second Amended Complaint, the defendant denies each and every allegation contained therein.

IV.

For answer to Paragraph IV of plaintiff's Second Amended Complaint, the defendant denies each and every allegation contained therein.

FOR A FURTHER ANSWER and by way of a FIRST AFFIRMATIVE DEFENSE, defendant alleges as follows:

I.

That the \$10,000 (ten thousand dollar) War Risk Term Insurance granted Charles V. LaFavor during

his period of service lapsed for non-payment of the premium due thereon April 1, 1919, and was not in force or effect thereafter except for the \$3,000 (three thousand dollars) thereof which was reinstated and in force at the time of his death.

WHEREFORE, having fully answered, the defendant prays that this action be dismissed and that it may go hence without day and recover its costs and disbursements herein.

ANTHONY SAVAGE,

United States Attorney.

TOM DeWOLFE,

Assistant United States Attorney.

JOSEPH A. MALLERY,

Assistant United States Attorney. [6]

United States of America,  
Western District of Washington,  
Southern Division.—ss.

Tom DeWolfe, being first duly sworn, on oath deposes and says: That he is Assistant United States Attorney for the Western District of Washington, Southern Division, and as such makes this affidavit on behalf of the defendant herein; that he has read the foregoing Answer, knows the contents thereof, and believes the same to be true.

TOM DeWOLFE

Subscribed and sworn to before me this 25 day of September, 1933.

[Seal]

E. W. PETTIT,

Deputy Clerk, U. S. District Court, Western District  
of Washington.

Received a copy of the within this 25 day of Sept., 1933.

A. W. NEWMAN,  
Attorney for Plaintiff.

[Endorsed]: Filed Sep. 25, 1933. [7]

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[Title of Court.]

RECORD OF PROCEEDINGS:

At a regular session of the United States District Court for the Western District of Washington, held at Tacoma, in the Southern Division thereof on the 30th day of September, 1933, the Honorable Edward E. Cushman, U. S. District Judge presiding, among other proceedings had were the following, truly taken and correctly copied from the Journal record of said Court as follows:

No. 8120

[Title of Cause.]

RECORD OF HEARING.

On this 30th day of September, 1933, this cause comes on for hearing on motion of the Government to strike the cause from the trial calendar, plaintiff appearing by J. T. McCutcheon, Esq., her attorney. Telegram from Lucy Ann LaFavor is filed, the telegram being authorization for A. W. Newman and J. T. McCutcheon to act as attorneys for the said Lucy Ann LaFavor. Third Amended Complaint is filed showing additional party plaintiff.

The Government withdraws its motion to strike

cause from the trial calendar and stipulates that defendant's Answer to Second Amended Complaint heretofore filed shall stand as answer to the Third Amended Complaint. [8]

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[Title of Court and Cause.]

REPLY.

Comes now the plaintiffs above named by their attorneys A. W. Newman and John T. McCutcheon, and for reply to defendant's answer to second amended complaint, deny and allege as follows:

I.

Deny each and every allegation and thing set forth in defendant's first affirmative defense thereof.

WHEREFORE, having fully replied, plaintiffs renew their prayer as set forth in their third amended complaint.

A. W. NEWMAN,  
JOHN T. McCUTCHEON,  
Attorneys for Plaintiffs.

United States of America,  
Western District of Washington,  
Southern Division.—ss.

Martha LaFavor, being first duly sworn on oath, deposes and says: That she is one of the plaintiffs in the above entitled action; that she has read the foregoing reply, knows the contents thereof and the

statements therein contained are true as she verily believes.

(Signed) MARTHA M. LaFAVOR

Subscribed and sworn to before me this 4th day of October, A. D. 1933.

[Notary Seal] JOHN T. McCUTCHEON,  
Notary Public in and for the State of Washington,  
residing at Steilacoom.

[Endorsed]: Filed Oct. 4, 1933. [9]

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[Title of Court and Cause.]

VERDICT.

We, the jury empanelled in the above-entitled cause, find for the Plaintiffs and further find that Charles V. LaFavor became totally and permanently disabled before the 24th day of March, 1919.

( Signed) CHAS. C. MILLER,

Foreman.

[Endorsed]: Filed Oct. 6, 1933. [10]

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[Title of Court.]

RECORD OF PROCEEDINGS.

At a regular session of the United States District Court for the Western District of Washington, held at Tacoma, in the Southern Division thereof on the sixth day of October, 1933, the Honorable Edward E. Cushman, U. S. District Judge presiding, among other proceedings had were following, truly taken

and correctly copied from the Journal record of said Court, as follows, to-wit:

[Title of Cause.]

#### RECORD OF FURTHER TRIAL.

On this 6th day of October, 1933, all parties being present, come the jury into court, and all being present, roll call is waived and the jury return a verdict as follows: "We, the jury empanelled in the above entitled cause find for the plaintiffs and further find that Charles V. LaFavor became totally and permanently disabled before the 24th day of March, 1919. Chas. C. Miller, Foreman."

Whereupon the said verdict is received and filed and the jury is discharged from further consideration of this case.

The Court fixes Saturday, October 14th for settling Findings and Judgment, and the Government is granted until and including January 2, 1934, for serving and lodging its Bill of Exceptions. [11]

In the District Court of the United States, Western  
District of Washington, Southern Division.

No. 8120

MARTHA M. LaFAVOR, Administratrix of the  
Estate of CHARLES V. LaFAVOR, Deceased,  
and LUCY ANN LaFAVOR,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

### JUDGMENT.

The above cause coming on for trial on the 3rd day of October, 1933, and the plaintiffs appearing by their attorneys, A. W. Newman and John T. McCutcheon, and the defendant being represented by its attorneys, Tom DeWolfe and Joseph Mallery, assistant United States Attorneys and Earl C. Whiteley, and a jury having been impanelled to try said cause, and the parties having submitted their testimony to the court and jury, and the court having instructed the jury as to the law applicable to said cause, and the jury having returned a verdict finding for the plaintiff, and substantially as follows:

“We, the jury in the above entitled cause, find for the plaintiff and find that Charles V. LaFavor became totally and permanently disabled before the 24th day of March, 1919.”

now, therefore, it is

ORDERED, ADJUDGED AND DECREED  
that the plaintiff, Martha M. LaFavor, administra-

trix of the estate of Charles V. LaFavor, deceased, have judgment against the United States of America for all installments accruing since March 24th, 1919, to January 11, 1932, upon the policy of War Risk Insurance described in plaintiff's complaint herein, wherein Charles V. [12] LaFavor, deceased, is the assured, amounting to the sum of \$6198.50, and it is further

ORDERED, ADJUDGED AND DECREED that the plaintiff, Lucy Ann LaFavor have judgment against the United States of America for all installments accruing on said policy of War Risk Insurance since January 11, 1932, amounting to \$805.00, and for any and all installments on said policy of War Risk Insurance that will become due in the future until the entire amount of said policy is paid in full, and it is further,

ORDERED, ADJUDGED AND DECREED that the attorneys for the plaintiffs, A. W. Newman and John T. McCutcheon, are allowed ten per cent of any recovery now or hereafter made as the result of this action, payable as such amounts fall due as attorneys fees.

DONE in Open Court this 17th day of October, 1933.

EDWARD E. CUSHMAN,

Judge.

O.K. as to form

TOM DeWOLFE

Asst. U. S. Atty.



Examined and Approved this 17th day of October, 1933.

.....  
Attorneys for Defendant.

[Endorsed]: Filed Oct. 17, 193. J & D 3, Pg. 85. [13]

-----  
[Title of Court and Cause.]

MOTION FOR NEW TRIAL.

Comes now the defendant, The United States of America, by Anthony Savage, United States Attorney for the Western District of Washington, and Tom De Wolfe, Asst. United States Attorney for said district, and moves this Honorable Court for a new trial of the above entitled case, on the following grounds:

1. That the verdict herein is contrary to law and the evidence.
2. Error in law occurring at the trial and duly excepted to at the time.

ANTHONY SAVAGE

United States Attorney.

TOM DE WOLFE

Asst. United States Attorney.

Received a copy of the within this ..... day of ....., 19.....

ANDREW NEWMAN

JOHN T. McCUTCHEON

Attorneys for plaintiff.

[Endorsed]: Filed Nov. 27, 1933. [14]

[Title of Court and Cause.]

ORDER DENYING DEFENDANT'S MOTION  
FOR NEW TRIAL.

Defendant's motion for new trial having come on for argument on the date mentioned below and the motion having been submitted to the Court without argument and the Court being duly advised in the premises, now, therefore

IT IS HEREBY ORDERED AND ADJUDGED that defendant's motion for a new trial be and the same hereby is denied.

Done in open Court this 16th day of December, 1933.

EDWARD E. CUSHMAN

United States District Judge.

Defendant excepts. Exception allowed.

EDWARD E. CUSHMAN

District Judge.

[Endorsed]: Filed Dec. 11, 1933. [15]

G. O. B. 8, Pg. 847

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[Title of Court and Cause.]

ORDER.

Upon application of the defendant herein, and pursuant to stipulation of the parties, it is hereby

ORDERED that defendant herein may have up to and including the 16th day of Jan. 1934, in which to lodge its proposed Bill of Exceptions herein, and serve the same.

Done this 27th day of Dec. 1934.

EDWARD E. CUSHMAN

United States District Judge.

OK

A. W. NEWMAN

JOHN T. McCUTCHEON

Attorneys for Plaintiff.

[Endorsed]: Filed Dec. 27, 1933. [16]

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[Title of Court and Cause.]

ORDER

Upon application of the defendant herein, and pursuant to stipulation of all parties, it is hereby

ORDERED that defendant herein may have up to and including the 17th day of Febr., 1934, in which to have settled its proposed Bill of Exceptions herein; and it is

Further ORDERED that the July 1933 term of Court date for that purpose.

Done in open Court this 16th day of January, 1934.

EDWARD E. CUSHMAN

United States District Judge.

OK

A. W. NEWMAN

JOHN T. McCUTCHEON

Atty. for Plts.

[Endorsed]: Filed Jan. 16, 1934. [26]

[Title of Court.]

RECORD OF PROCEEDINGS:

At a regular session of the U. S. District Court for the Western District of Washington, held at Tacoma, in the Southern Division thereof on the 26th day of January, 1934, the Hon. Edward E. Cushman, U. S. District Judge presiding, among other proceedings had were the following, truly taken and correctly copied from the Journal record of said Court as follows:

[Title of Cause.]

**ORDER.**

On this 26th day of January, 1934, it is by the Court ordered that the time for settlement of the Bill of Exceptions in the above entitled cause be and hereby is fixed for February 10, 1934 at the hour of ten o'clock in the forenoon.

The Clerk is directed to notify counsel of this Order. [27]

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[Title of Court and Cause.]

**ORDER.**

Upon application of the defendant herein, and pursuant to stipulation of all parties, it is hereby

**ORDERED** that defendant herein may have up to and including the 15th day of March, 1934, in which to transmit its record on appeal herein to the Clerk of the United States Circuit Court of

Appeals for the Ninth Circuit, at San Francisco, California.

Done in open court this 30th day of January, 1934.

EDWARD E. CUSHMAN

United States District Judge.

OK

A. W. NEWMAN

JOHN T. McCUTCHEON

Attys. for Plaintiff.

[Endorsed]: Filed Jan. 30, 1934. [28]

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[Title of Court.]

RECORD OF PROCEEDINGS:

At a regular session of the United States District Court for the Western District of Washington, held at Tacoma, in the Southern Division thereof on the 13th day of February, 1934, the Honorable Edward E. Cushman, U. S. District Judge presiding, among other proceedings had were following, truly taken and correctly copied from the Journal record of said Court, as follows, to-wit:

[Title of Cause.]

CONTINUANCE.

On this 13th day of February, 1934, settlement of the proposed Bill of Exceptions in the above entitled cause is passed to the first regular motion day in March, 1934. [29]

[Title of Court.]

RECORD OF PROCEEDINGS:

At a regular session of the United States District Court for the Western District of Washington, held at Tacoma, in the Southern Division thereof on the 16th day of February, 1934, the Honorable Edward E. Cushman, U. S. District Judge presiding, among other proceedings had were following, truly taken and correctly copied from the Journal record of said Court, as follows, to-wit:

[Title of Cause.]

ORDER EXTENDING TIME.

On this 16th day of February, 1934, the plaintiff appears by A. W. Newman, one of her attorneys, and the Government appears by Asst. U. S. Attorney Tom DeWolfe. It is ordered that the time for settling Bill of Exceptions is fixed for February 21, 1934 at two o'clock P. M., and the Government is allowed to and including March 20, 1934 to file its record in the Circuit Court of Appeals for the Ninth Circuit. [30]

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[Title of Court and Cause.]

DEFENDANT'S PROPOSED BILL OF  
EXCEPTIONS.

BE IT REMEMBERED that heretofore and on, to wit, the 3d day of October, 1933, at the hour of ten o'clock A. M., the above entitled cause came regularly on for trial in the above entitled Court

before the Honorable Edward E. Cushman, Judge of said Court, sitting with a jury, in the courtroom of the Federal Building, at Tacoma, Washington, the plaintiff Martha M. LaFavor appearing in person and by her attorneys, John T. McCutcheon and A. W. Newman, and the plaintiff Lucy Ann LaFavor not appearing and being represented by her attorneys John T. McCutcheon and A. W. Newman, the defendant appearing by its attorneys, Anthony Savage, United States Attorney for the Western District of Washington, and Tom DeWolfe, Assistant United States Attorney for said District.

WHEREUPON, the jury being duly empaneled and sworn to try the cause, the following proceedings were had and testimony taken, to wit:

TESTIMONY OF JULIUS ENGLUND,

For Plaintiffs

JULIUS ENGLUND, after being first duly sworn on oath, testified as follows on behalf of plaintiffs, on [31]

Direct Examination.

By Mr. NEWMAN:

My name is Julius Englund. I live at Route 5, Box 84, Tacoma, Washington. I was in the military service during the World War with Company A, 362d. I knew Charles LaFavor while I was in the service. He was with Company A, 362d. We were both in the same organization. I met him in the Company—he was in the hospital at the time at Fort Lewis. That was about 1918. I was at

(Testimony of Julius Englund.)

Camp Lewis about three months. Mr. LaFavor was in the hospital at Camp Lewis when I got to the Company. After I joined the Company he remained there until the latter part of May. I joined the Company in the middle of April. At the time I joined the Company he was in the hospital and remained there until the latter part of May. From Camp Lewis we entrained for Camp Merrick, New Jersey. Mr. LaFavor went with the organization. From Camp Merrick, New Jersey, we went to Southampton, England, and Mr. LaFavor was with the organization, at that time. From Southampton we went to La Havre, France, and Mr. LaFavor went along. From La Havre we went to Demartine, France, and Mr. LaFavor went with the organization there. I was with the Company then for approximately three weeks and then I was sent to the hospital. Mr. LaFavor was with the Company during those three weeks. I met Mr. LaFavor again up here at the Cushman Hospital. I did not see him in France again. I was with the organization again in France. I joined the organization again in France up in the Argonne woods, that was up on the front line. Mr. LaFavor was not with the organization then. I went back to Company A 362d Infantry at the Argonne Forest. Mr. LaFavor was not with the organization at that time. I went back to Company A 362d [32] Infantry at the Argonne Forest after they made the first drive—I should judge it would be the 30th of September. I



(Testimony of Julius Englund.)

was not with that organization during the first drive,—I was in the hospital. I joined the organization when they were making their second drive. I next saw Mr. LaFavor at the Cushman Hospital, in Tacoma, in the early part of 1927, if I remember right. I was at the Cushman Hospital at that time. I did not know Mr. LaFavor before he went into the service.

Q. Now, you may state what you saw, what you noticed about his appearance that was different than from when you saw him in Camp Lewis, will you state to the jury what you noticed about him that was different?

A. Well, there was quite a difference in him; he was going around limping.

Q. He was limping?

A. Yes.

Q. What else?

A. Complaining about his side.

Mr. DeWOLFE: We move to strike that as hearsay.

The COURT: Overruled.

Mr. DeWOLFE: Exception.

The COURT: Motion denied.

Mr. DeWOLFE: Exception.

The COURT: Allowed.

I did not have an opportunity to see his left arm at that time, nor his chest. I cannot recollect just at this moment what, if anything further was noticed by me that was different at that time. [33]

(Testimony of Julius Englund.)

Q. Did you observe any difference in his complexion?

Mr. WHITLEY: That is leading, if the Court please.

The COURT: Objection overruled. Answer that yes or no and wait for another question.

Mr. DeWOLFE: Exception.

The COURT: Allowed.

I observed a difference in his complexion, he had a sallow complexion, at Cushman Hospital. When I first met him at Cushman Hospital I observed a difference in his posture; he never walked erect.

Q. Will you tell the jury just how he did walk?

A. He always walked with a cane stooping over forward, sort of favored his left side.

Mr. DeWOLFE: We move to strike, he "sort of favored his left side".

The COURT: Denied.

Mr. DeWOLFE: Exception.

The COURT: Allowed.

Q. Did he at that time make any complaint to you about his heart?

Mr. DeWOLFE: We object to that as leading and as hearsay and depriving the Government of the right of cross-examination.

The COURT: Objection overruled. The witness is instructed that that means any complaint he made when he claimed to be, at the time of making the complaint, suffering in regard to his heart—not telling about something that had happened be-

(Testimony of Julius Englund.)

fore, but any complaint regarding his present condition at the time he made the complaint. [34]

Mr. DeWOLFE: Exception.

The COURT: Exception allowed.

He made no complaint to be about his heart at that time. At that time he complained to me about pain in the chest. He said he had pain in the chest but he did not say anything more definite about it. I was a patient at the hospital at that time. I was in the same ward with Mr. LaFavor. I had an opportunity to observe him in that ward. Mr. LaFavor was just like all the rest of the patients, able to get up at his leisure.

Julius Englund testified as follows on

Cross Examination.

By Mr. DeWOLFE:

The last time I saw him overseas was at Demartine, in 1918. I did not see him again until I saw him in Cushman Hospital in 1927.

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TESTIMONY OF WILLIAM HARTWICH,  
for Plaintiffs.

WILLIAM HARTWICH, after being first duly sworn on oath, testified as follows on behalf of plaintiffs, on

Direct Examination.

By Mr. McCUTCHEON:

My name is William Hartwich. I live at Route 4, Box 715 A. With reference to where Mrs. LaFavor

(Testimony of William Hartwich.)

now lives, it is two 10-acre tracts between her place and ours. I would say I live about one block from there. I met Charles V. LaFavor just shortly after I bought this land out there where we live at the present time. That was in April 1931. Mr. LaFavor was not living there then—he was just trying to [35] erect his house at the time and I became acquainted with them then. By “them” I mean Mr. and Mrs. LaFavor and their family. It was about a three room house he was building at the time. She did most of the work, what I saw of it, she did most of the work; he did, maybe, the light work, like hammering and light work fitting it up. She sawed the boards, as far as I saw; I don’t remember seeing him saw one. I have to carry my own water and I drive by the place every day and in winter, every other day, and while he was building the house—he never worked long hours on it from what I saw. That was in the summer of 1931. He would get back there in the neighborhood of ten o’clock, he and his wife and children, and he would leave in the neighborhood of maybe three or four o’clock in the afternoon—the times I did see him, when he was out there. They moved into that place. There may be an attic in it; I have never been up in the house; it is not a two-story house. He came up to my place one time when I was digging a well. That was in July or the first part of August, 1931.

Q. What were you doing?

A. My brother-in-law and I were digging a well and he came up (as we were interested in getting

(Testimony of William Hartwich.)

some water) and he came up to see how the well was coming along and we asked him to look into it; he says "No, I can't look down".

Mr. WHITLEY: I object to what he said.

The COURT: Objection overruled.

Mr. WHITLEY: Exception.

The COURT: Allowed.

Q. He said on account of what? [36]

A. He said he could not look down the well, he said.

Q. What else?

A. He said his heart bothered him and he didn't dare look down——

Mr. DeWOLFE: We object to that as hearsay.

The COURT: Overruled.

Mr. DeWOLFE: On that point, I would like to have Your Honor reserve the ruling on that for the reason the authorities hold unless the disability claimed—the statements of the insured are not admissible in evidence even on the testimony of the experts unless showing is made that the expert took that history for the purpose of treating him and not for the purpose of testifying in the trial here—we are deprived of the right of cross-examination. I can produce the authorities at 2:00 o'clock.

The COURT: You may produce that at 2:00 o'clock; the general rule is that a person's statement, explanatory of an act, is not hearsay.

Mr. DeWOLFE: The only case I found that admitted such statements was explanatory of the

(Testimony of William Hartwich.)

mental condition of the insured—other cases ruled them out even when taken by a physician.

The COURT: The objection is overruled.

Mr. DeWOLFE: Exception.

The COURT: Allowed.

At that time the well was—we were only about 26 feet. I lived neighbors to them from 1931 on to the time of his death. I believe it was in January 1932 that he died, if I remember—I don't remember the dates. [37] I was present at the house very shortly before he died. I saw him. He was in bed. The time I saw them working, building the little house, that was in the summer, July, or that neighborhood. I did not see him a great deal during the fall or winter of 1931 prior to his death. I had lots of work of my own and I very seldom went down that way, outside of passing by when I went by. I did see him from time to time. He never did walk straight from the time I saw him. He was always kind of stooped. I would not want to say which way, left or right. At the time I saw him he did not have a cane. He just got out of the car and we would talk a few minutes when I would go down there. His complexion from the time I very first met him—I kind of looked twice because I never knew the man was very sallow and yellowish and I know he had kind of a twitch to his face. You could see one side of his face twitch up. The very first time I met him, I talked to the man between ten and fifteen minutes and there were four or five times then that his face twitched, in that

(Testimony of William Hartwich.)

length of time. It was more one side of the face, not the whole face. I could not say whether or not he shook his head at the same time. I did not have occasion or opportunity to observe him strip down, in any of his limbs, arms or legs. At the time I knew him, I would say he weighed in the neighborhood of 140 pounds, not over that at the most. I brought a doctor up to Mr. LaFavor's house prior to his death.

William Hartwich testified as follows on

Cross Examination.

By Mr. DeWOLFE:

The first time I saw him was in 1931. During the [38] summer of 1931 he passed down by the house as he was going down. I would get out early and start clearing my land. He would drive by and once in a while he would stop; another time, he would wave as he was driving by. During that summer I went down several times. We were working on the school situation and I had quite a talk with him. Mr. LaFavor drove by my house. He had a car that he was driving then, a Chevrolet sedan. He was driving it himself. I would see him Sundays, the biggest share of the time until I moved out there—that I would see him come out driving that car. I saw him doing some work on the house, very light. I saw him as early as ten o'clock in the morning and as late as four o'clock in the afternoon.

William Hartwich testified as follows on

(Testimony of William Hartwich.)

Redirect Examination.

By Mr. McCUTCHEON:

Mr. LaFavor was just about dead as I got there. Mrs. LaFavor came up after me and I went in to get the doctor. I was present at his bedside with the doctor at the time he died. He was beyond making statements; he was unconscious at the time.

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JULIUS ENGLUND,

recalled, testified as follows on

Direct Examination.

By Mr. McCUTCHEON:

I saw Mr. LaFavor at Fort Lewis in 1918 after I came out of the hospital. The Company was then doing infantry drill. Mr. LaFavor did not join the infantry drill. The infantry drill consisted of field drilling, doing formation,—heavy work. After I came out of the hospital, Mr. LaFavor was doing officers' quarters work, light fatigue work, consisting of sweeping out, taking care of the officers' [39] quarters.

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TESTIMONY OF MARTHA M. LaFAVOR,  
Plaintiff.

MARTHA M. LaFAVOR, one of the plaintiffs herein, after being first duly sworn on oath, testified as follows on



(Testimony of Martha M. LaFavor.)

Direct Examination.

By Mr. McCUTCHEON:

My name is Martha M. LaFavor. I am one of the plaintiffs in this action. I am the duly appointed administratrix of the estate of Charles LaFavor, appointed by the Superior Court of Pierce County, Washington. I live at Route 3, Box 2368, Puyallup,—that is my route number—I live on East 72d Street. I now live in the place where Charles LaFavor died. Lucy Ann LaFavor is my husband's mother. She will be 86 this coming birthday. She stayed with me. Now, she is visiting some folks. Before I was married I was from Scobey, Montana. I believe Scobey is in eastern Montana. I first met Charles V. LaFavor—well, we lived right across the road from each other—we were neighbors, at Scobey, Montana. That is a town about like Puyallup. I first met him in 1917. At that time he and I worked together. I worked in a restaurant and he was doing cement work for his brother, building a big building. When that was done he was digging a well with pick and shovel. I was keeping company with him at that time. He worked at the cement work until they had the building done—until May, 1917. Then he went to digging a well for a man by the name of Lynch, digging with pick and shovel. He worked on that well two months in the spring and summer of 1917. Then he worked in the lumber yard, The Curtis Lumber yard, piling up lumber. We were engaged to be married in June,

(Testimony of Martha M. LaFavor.)

1927. [40] He left for Fort Lewis, September 18, 1917.

Q. Now, at that time, Mrs. LaFavor, do you know how much he weighed?

Mr. DeWOLFE: I object to that.

A. He weighed 175.

Mr. DeWOLFE: We object to that until it is shown that it is not hearsay.

The COURT: Objection overruled.

Mr. DeWOLFE: Exception.

The COURT: Allowed.

He weighed 175 pounds. From the time I first met him, up until the time he left for Fort Lewis—it was early 1917, early spring, until the morning he took the train, in September, 1917. During those months I would see him every day, sometimes twice a day. Before the war, during that time, I did not see him in bed or incapacitated from illness. He was very healthy, strong, nice healthy looking man; never had any illness. He was five foot, six. When he left for Fort Lewis on September 18, 1917, I received letters from him from Fort Lewis, up until he left for France. We got a card from him that the ship was sailing, that was in 1918; I don't remember the month. In 1918, the first part of the fall, I again received a letter from him after the card which I received telling me he was sailing. I haven't the letters; my husband destroyed it two weeks before he died. The envelope is destroyed as well as the letter. It was postmarked in France; he was in the base hospital. I got three letters, as

(Testimony of Martha M. LaFavor.)

often as one month or two months—we did not get the mail regular. We got one letter from him post-marked from the base hospital. We heard [41] from him again in April—no, not April; in February, 1919. We got a letter. He arrived back on the first of April, 1919. I met him at his home, in Scobey, Montana. I saw him April 21, 1919. When I met him he was lying down on the bed—when I first saw him. He got up and walked with a cane. He walked with a cane three months after he got out. When I saw him, his mouth was all full of blisters, his eyes were bloodshot and he had scabs on his head—it was full of scabs. He was yellow and very blue about his eyes. He was skinny.

The Plaintiff, Martha M. LaFavor, testified as follows on

#### Cross Examination

By Mr. DeWOLFE:

I could not be there when he was weighed. He weighed himself before he went away—I saw him. When he came back I was present when he weighed. I saw how much he weighed by the scales—he and I weighed.

The Plaintiff, Martha M. LaFavor, testified as follows on

#### Redirect Examination

By Mr. McCUTCHEON:

He weighed 130 pounds. He had light clothes on.

TESTIMONY OF W. H. GEARING,  
For Plaintiffs

W. H. GEARING, after being first duly sworn on oath, testified as follows on behalf of plaintiffs, on

Direct Examination

By Mr. NEWMAN:

My name is W. H. Gearing. I practice medicine at Tacoma, Washington, Medical Arts Building. I have practiced here three—four years. I am a graduate of the University of Iowa. I am specializing in bone and joint disorders. I know a man by the name of Charles LaFavor, now [42] deceased. I examined him during his lifetime. I first saw Mr. Charles LaFavor on the 14th of October, 1931. I examined Mr. LaFavor at that time. From my examination I found a condition of traumatic arthritis. The word “traumatic”, of course, means injury, of any type, a direct or indirect injury, and arthritis is rheumatism in the joints as a result of an injury. At that time Mr. LaFavor gave me a history of his condition; that is the usual procedure for examination, a history and examination. We always use a history as a help in making a diagnosis. The first thing, we ask if there has been any previous injury or diseases that the man had had and he gave this history to me; he had scarlet fever in 1918 while he was in the service at Camp Lewis; he had pneumonia in 1918, pleural pneumonia, and he also gave a history of having the grippe in 1918, while in France; he gives a history of sore throat; he has had rheumatic fever while he was in France, and

(Testimony of W. H. Gearing.)

on questioning, whether he had pleurisy, he acknowledged he had pleurisy for which he was tapped in 1918, out at Fort Lewis. His chief complaint was pain in the lower back and left leg; then we got the clinical history; present complaint dates back to 1918, while in the service in France. He gives (practically the patient's words)—he gives a history of the explosion of a large shell in which he was buried in the dirt, was knocked down by this explosion—kept in bed in the base hospital five months; he was treated by heat, massage and therapy. That was the history up to his present illness; he had never gotten over the lower back pain, pain in the lower back, with weakness; catches cold very easily; the pain is aggravated; also exertion causes pain; kept awake at nights—in wet weather, caused pain and he complained of pain when [43] stooping over and also when doing extensive walking. That is the history up to the examination. I have a note here that his heart was a little enlarged; the man wore glasses and he was quite constipated—gastro-intestinal disorder, constipated; from his remarks and what I found out from the examination. I x-rayed the patient. I have the x-rays here.

Q. I am handing you this x-ray, plaintiffs' exhibit 11; Doctor, I will ask you what that is?

A. That is a picture of the—what we call, the lumbo-sacral spine—of the pelvis.

Q. Is this an x-ray of Charles LaFavor?

A. It is.

(Testimony of W. H. Gearing.)

Mr. NEWMAN: I offer it in evidence.

Mr. WHITLEY: Was that taken by yourself, Doctor?

A. It was taken by the man who does my x-ray work.

Mr. WHITLEY: It wasn't taken by yourself?

A. No.

Mr. WHITLEY: I object to it as not properly identified.

Q. Were you there when this was taken?

A. The man was referred to the floor above me, the picture was taken up there and the picture immediately sent down by the patient.

The COURT: "Immediately"—how soon?

A. As soon as the picture was developed.

The COURT: That is, in relative time?

A. Five or ten minutes.

The COURT: Overruled.

Mr. WHITLEY: Exception.

The COURT: Allowed.

Plaintiffs' exhibit 11, the x-ray last above referred to, admitted in evidence and made a part of the record herein. [44]

(Witness places x-ray in shadow box, and testifies therefrom.)

This is a picture of the lower spine, lumbar spine, and the pelvis including the hip joints; a physical examination of this man showed trouble in the left sacro-iliac joint, which is this joint you see here, the joint between the two pelvic bones, where it meets the sacrum, which is at the lower end of the spine. We have evidence in the increased

(Testimony of W. H. Gearing.)

density in this joint here of an arthritic process, which is also at the same time shown by the tilting of the spine to the opposite side of the injury, which we call a "position hauncha", which means that the patient assumes the position most comfortable, which is, naturally, away from the side of the trouble and you notice this spine tilting over towards the right. The increased density is shown right in this lower portion (indicating on x-ray) of this sacro-iliac joint—plus the physical examination, and from that point we make our diagnosis.

Injury and infections will give us arthritis. From his history of an injury, which occurred years before, of course, when this picture was taken, he had constant trouble in that locality from an injury he received while in France—it is possible to assume that the injury was the exciting cause of the trouble.

(Plaintiffs' exhibit #12 handed to Dr. Gearing by Mr. Newman.)

Q. Doctor, was this taken in the same manner as the previous exhibit?

A. It was.

Q. At the same time?

A. Same time. [45]

Mr. WHITLEY: I object to it as not properly identified.

The COURT: Is it offered?

Mr. McCUTCHEON: Yes.

The COURT: It is now offered?

Mr. McCUTCHEON: Yes.

The COURT: Objection overruled.

(Testimony of W. H. Gearing.)

Mr. WHITLEY: Exception.

The COURT: Allowed.

Plaintiffs' exhibit No. 12, the x-ray last above referred to, admitted in evidence and made a part of the record herein.

This portrays a portion of the cervical spine, portion of the spine, shoulders up to the base of the skull. The patient, at the time of taking the history and examination complained also of pain in the neck and, for that reason, this picture was taken. It shows, it is rather difficult to see a slight roughening between the sixth and seventh cervical vertebrae—also an arthritic process. What caused that is problematical—may be due to injury and infection, chronic infection of some sort. Taking this patient's history into consideration, I would say infection in this particular region was the cause of it. His history as given was that of extensive illness, influenza, pleurisy, which are infections, which very likely produce an arthritis.

Plaintiffs' exhibit #13 is a lateral view of the same portion of the spine, as you saw in this first picture, of Mr. Charles LaFavor. They were all taken the same moment, in the same manner.

Mr. NEWMAN: I offer it in evidence.

Mr. WHITLEY: We object that it has not been properly identified.

The COURT: Overruled, admitted. [46]

Mr. WHITLEY: Exception.

Plaintiffs' exhibit No. 13, the x-ray last above referred to, admitted in evidence and made a part of the record herein.



(Testimony of W. H. Gearing.)

That (indicating plaintiffs' exhibit number 13) portrays a lateral view through the lower spine in this direction rather than from the front to the back as in the other picture. This picture shows a slight slipping of the sacrum, which is this lower end of the spine, below the last lumbar vertebra, which you see here (indicating) as you follow the curve along here, there is a slight forward slipping of this into that one. That means in all likelihood a traumatic injury, slipping of this sacrum forward. The term "traumatic" means as the result of an injury. From my examination of Mr. LaFavor, I would say that his was a chronic condition. In my opinion, the exact time of this condition would be difficult to tell but I presume a period of years, which we based on the standpoint that the spine has compensated by its tilting away from the side of the injury, which does not occur immediately.

Q. From the history as given you by the patient, have you any opinion, as to when this arthritis originated?

Mr. WHITLEY: We object, if the Court please.

The COURT: Overruled.

Mr. WHITLEY: Exception.

The COURT: That can be answered yes or no.

Mr. WHITLEY: Exception.

The COURT: Allowed.

(Reporter repeats question) [47]

A. Arthritis originated as the result of the injury sustained at the time of his injury in battle or whenever the injury occurred.

(Testimony of W. H. Gearing.)

Mr. WHITLEY: I move the answer be stricken as not responsive.

The COURT: It was not responsive but objection overruled. It called for a yes or no answer.

Mr. WHITLEY: Exception.

The COURT: Allowed.

I am familiar with the occupation of general farming.

Q. In your opinion, Doctor, would you say that Mr. LaFavor at any time since he contracted this disease, could have continuously followed the occupation as a general farmer?

Mr. WHITLEY: I object, first, on the ground if the Court please, it doesn't properly state the evidence in the case—not the proper foundation for a hypothetical question.

Mr. DeWOLFE: In this connection, may I be heard? In a recent case in the Circuit Court of Appeals—U. S. v. Soule, where apparently a lay witness was allowed to answer a hypothetical question as to whether in his opinion the man could continuously follow a gainful occupation, the Circuit Court of Appeals said in that case: (Reads citation).

The COURT: The objection is sustained. The Court is not inclined to deny a witness, qualified as the doctor is, to express an opinion regarding the particular occupations that a person suffering from a condition that the Doctor is familiar with—or not able to perform—but just to sum it all up by asking a sweeping inquiry, as to any substantially gainful occupation, the Court cannot assume [48] he is

(Testimony of W. H. Gearing.)

familiar with all sorts of gainful occupations. Objection sustained.

Mr. McCUTCHEON: The question here was regarding farming—he particularizes farming.

The COURT: You got so far from the question—I certainly understood, any substantially gainful occupation.

Mr. NEWMAN: The question was general farming.

The COURT: I misunderstood the question. Objection overruled.

Mr. DeWOLFE: Exception.

The COURT: Allowed.

The REPORTER: (Repeats the question)

Mr. DeWOLFE: It invades the province of the jury.

The COURT: Objection overruled.

Mr. DeWOLFE: Exception.

The COURT: Allowed.

I don't think he would be able to follow the occupation as a farmer. I don't think he can follow the occupation of a farmer at the time I saw the patient.

W. H. Gearing testified as follows on

Cross Examination

By Mr. WHITLEY:

Of course, if the history as given by Mr. LaFavor to me was not in accordance with the actual facts, it would make a difference in my answers to these questions. In arriving at a diagnosis, the

(Testimony of W. H. Gearing.)

history, physical findings and the x-ray, we base our diagnosis on those three findings. I was not present while the technique of taking the x-rays was being done. In the request for the x-ray, as done, I ask for a picture taken in a certain position and the tech- [49] nique is carried out by the technician as requested. The first film I exhibited to the jury showed an arthritic condition. As to how long the process had been going on, looking directly at the point of pathology and looking at the picture from the standpoint of the tilting of the spine, I would say that it did not occur immediately; that it was of some standing. It is difficult to tell about how long. As to how long it had been in process, from the examination I made, I could say this—probably be a matter of years, rather than just the last week or so. That process would assume the proportions that are shown by the x-ray in two or three years. In my opinion, traumatic result of an injury was the cause of that arthritis. You cannot tell by the film whether it is infectious or traumatic. I arrived at the conclusion it was traumatic from the history of the case. He gave a history of certain diseases which were infectious. And from the history of the infection and injury he received, I arrived at the opinion it was a traumatic condition. I picked out the traumatic rather than infection because the traumatic is an added factor in producing symptoms. Without any trauma or injury the same condition could have been shown. If it resulted from tonsillitis or prostatitis, without any trauma or injury the

(Testimony of W. H. Gearing.)

same condition could have been shown. I examined Mr. LaFavor just the one time, on October 14, 1931. He was referred to me by Dr. Steele for an orthopedic examination. I did not know at the time I examined him it was for the purpose of testifying in this examination. My examination indicated an enlarged heart, and the findings upon which that was based were on percussing the chest. I just marked it down as heart being slightly en- [50] larged; he was sent to us, primarily for the orthopedic examination. I made a complete examination of him at that time from the standpoint of orthopedic bones and joints. In order that it will be clear, I will state again, the difference between a traumatic arthritis and one that results from infection. The pathology—that is the end result—if a person can get arthritis or rheumatism, from an infection,—we all have infections, but the initial symptom or the time that the patient complains of pain, and what goes with an arthritic condition, may begin, and does begin as the result of an injury. Arthritis is a progressive disease. After trauma it usually comes into being practically immediately, from the standpoint of the patient's complaints; from the standpoint of the infection, it may be harbored for years before the symptoms begin. In an x-ray chronic arthritis will become discernible in a period of two or three years, formation of spurs, so on. An acute condition in which the joint is involved, swelling, so on, will be evident quite soon. I found chronic. The condition of arthritis

(Testimony of W. H. Gearing.)

of long standing being more serious or less serious than the early stages depends on the acuteness of the onset; some individuals will get over it readily and others will progress to actual stiffness of the joints. It is difficult to say which ones will do that and which ones will not. I did not examine Mr. LaFavor except on this one occasion.

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TESTIMONY OF JOHN F. STEELE,  
for Plaintiffs.

JOHN F. STEELE, after being first duly sworn on oath, testified as follows on behalf of plaintiffs, on

Direct Examination.

By Mr. NEWMAN:

My name is John F. Steele. I am practicing medicine [51] in Tacoma. I got my license in the State in 1917 and I came back here to Tacoma in January 1921, after the war. I am a graduate of the University of California. I have practiced medicine since 1917. I have specialized in diseases of the heart and lungs since I was in the Army in 1918. I knew Charles LaFavor, deceased. I examined him during his lifetime. I examined him October 10, 1931. He was in the office the second time and brought a specimen of urine and sputum with him at that time and I just saw him at that time, showed him the x-ray pictures and talked with him but did not examine him; the second time, pre-

(Testimony of John F. Steele.)

scribed for him, that was all. That was the last time I saw him. Mr. LaFavor gave me quite an extensive history before the examination was completed. I usually make my examination first, record my findings, then take a history of the patient after the examination. I made an x-ray of his chest and flourosoped him, that is, I looked through him in the dark room with a flouroscope, watching his heart beat and what we call the antero-posterior position, from front to back, 40 degree angle, from each side and looking through from the back and watching the movement of the diaphragm on both sides, as the patient would take a deep breath and then we made a tuberculin—what we call it—and a complete examination, which revealed a poor condition of his teeth, from pyorrhea; his tonsils were out; the larynx was normal; thyroid glands slightly enlarged; glands of the neck, cervical glands were not enlarged and the examination of the heart—of the pulse, with the patient lying on his back, 52 and 64; with the patient standing, his systolic blood pressure, 140; diastolic, 100, which is just a little bit [52] above normal for his age, 39 years. The area of cardiac dullness, as revealed by percussing the chest in this manner (indicating), over the heart and marking it and measuring it, was 8½ centimeters to the left of the midline, 3½ centimeters to the right of the midline and the apex—fifth intercostal space. There were no murmurs, no thrills at the apex, and no irregularity or

(Testimony of John F. Steele.)

arrhythmia of the heart. The lungs—shape, long, *board*, fairly deep mobility, lagging of the left lung; crepitus increased over both uppers; that is to the touch, putting the hand on the chest, we have the patient say “99” or “999” and see the vibration of the chest. The resonance as revealed by percussion of the finger, reveals on the right side decreased resonance, third rib, fourth spine in the back—left lung, decreased resonance, second rib, fifth dorsal spine up and, auscultation, we find bronchovesicular breathing—that is a certain type of breathing that is found in tubercular cases, whether it is active or arrested; it is a sharp inspiration and a long expiration. Normal breathing is a long inspiration and short expiration, and whispered voice, listening through the stethoscope, was found increased over the area from the third rib, fourth spine up, no rales elicited. The left lung, bronchovesicular breathing, increased vocal conduction and prolonged expiration second rib and fifth spine up. Few rather coarse rales heard at the first rib and second dorsal spine. Not the type of rale exactly we hear with active tuberculosis. And so, I marked his diagnosis, after looking at the x-ray, and everything, taking everything into consideration, as a case for observation for activity—not active, however. The abdomen was normal, with the exception [53] of a scar from—the abdomen—there was no hernia, no masses, no tenderness. Extremities—lameness when the patient walked and glandular system negative; for the spinal column,



(Testimony of John F. Steele.)

I referred the patient to Doctors Rich and Gearing for an examination and treatment. I found on the fluoroscopic examination, lagging of the diaphragm on the left side and in the x-ray film, this was seen to be adherent. There was nothing in the history—I mean in the examination of the heart to make a diagnosis of angina pectoris or coronary arteriosclerosis—but in many cases, even examining the patient, when they are having an attack—you cannot tell by a physical examination that they have this disease. So the diagnosis of coronary sclerosis with angina pectoris was made on the history of the case only. Pleurisy chronic fibrous in his left, was the third diagnosis I made. The urine was negative and the sputum examination revealed no tubercle bacilli.

John F. Steele testified as follows on

#### Cross Examination.

By Mr. WHITLEY:

This examination was not altogether made by me for the purposes of testimony in this case. The man was sent to me by Mr. Newman but after I had examined him and talked with him, he wanted me to treat him also. When I was taking the history and making the examination by reason of him being referred to me by Mr. Newman when he first came to me, yes, but before the examination was completed, Mr. LaFavor said he wanted me to treat him. When Mr. LaFavor came up there and I examined him, I did not have any arrangement with Mr. Newman to make the

(Testimony of John F. Steele.)

examination for the pur- [54] pose of this trial. Mr. Newman merely sent a little slip by the man, referring Mr. LaFavor for examination. I didn't know Mr. Newman, didn't know who he was, didn't know he was an attorney and the man didn't tell me anything about a court case pending. I did not hear from Mr. Newman on it until after the man died, the following January, I believe it was. This examination was made in October.

John F. Steele testified as follows on

Direct Examination (continued).

By Mr. NEWMAN:

Mr. LaFavor enlisted in the United States Army September 18, 1917; was discharged March 21, 1919; was wounded in action September 29, 1918. He has been having pains in the chest, at times very severe, extending to the left arm and ending in the elbow and sometimes down to the fingers and wrist. I remember he said, especially, that the pain hit him right there inside the wrist (indicating). Sometimes the pain was so strong it "rattled his wristbone", is the way he put it, and hit him in the elbow severely. He has had attacks of pain ever since he was in the army. Due to former wounds in action—also, had mustard gas in the war. At times he has had typical attacks of angina pectoris, comes on after eating; patient distended with gas; shortness of breath; pains in the chest and shoulders and arm. Also had trouble with his back, considerable pain

(Testimony of John F. Steele.)

and difficulty in walking. As to his past illnesses, he has had pleurisy at Camp Lewis, in the winter of 1917 and 1918; was tapped five times in the left pleural cavity; scarlet fever soon after this while still in the hospital; then he had either spinal meningitis or diphtheria before leaving [55] the hospital. He believed the doctors decided diphtheria because they gave him diphtheria antitoxin; hospitalized about five months after he was wounded from September 29, 1918 to March 1919. Had Spanish flu while in the hospital; was in the hospital for this.

The first diagnosis, coronary sclerosis with angina pectoris, means a hardening of the little arteries that supply the heart muscles with blood. These arteries when they are hardened, obstructed or narrowed down, cause very severe attacks of pain, pain which comes on very often after eating, especially if the person becomes distended with gas and, in many cases, the very first attack of angina pectoris may cause death but in many other cases, the person may go on and have many attacks and live on for years before it takes his life. I saw Mr. LaFavor just once again during his lifetime, on October 24th. At that time I did not make an examination, just talked to him. I saw him after he died. I examined the body. I made an autopsy. This autopsy was made by Dr. Martin, Pathologist at the Tacoma General Hospital, and myself. It was made on January 13, 1932. I was an associate with Dr. Martin on it. We both performed the autopsy together and I saw everything that he did. I mean I

(Testimony of John F. Steele.)

handled all the tissues that he had and was absolutely with him on the autopsy the same as though I had done it alone, with him assisting me. I did not make a personal examination of all the parts of the body but all the parts in the chest and abdomen, kidneys and spleen, everything. I examined the heart. The heart was not weighed but it was about normal in size for the body of this man, the cardiac muscle is firm, reddish brown in color, [56] muscle shows slight streaking but embalming may have obscured this in part. The endocardium, that is the inner lining of the heart and valves are free from evidences of disease. The first portion of the aorta and that portion giving origin to the coronary arteries shows a very mild hardening and no evidence of specific aortitis—referring to syphilis, no evidence of syphilitic aortitis. The coronary items are hardening and shows areas of calcium deposits, both right and left coronaries about equally involved and show a marked diminution in the calibre of the arthritis—on close examination, no actual point of obstruction or complete occlusion were found—that is, they were narrowed down but not to the point of being entirely occluded. And the right lung shows a small scar, that is in the apex of the lungs, but no hilus, calcification; because of embalming, these characteristics are largely obscured. Left lung covered by fibrous tissue which obscures color. There is a slight scar, small amount of hilus. This lung is changed by embalming much as is the right. The liver is normal in size and is normal as is the gall

(Testimony of John F. Steele.)

bladder and the pancreas. The spleen is about twice the normal size. The kidneys normal in size, firm, and the bladder and prostate not removed. Prostate on palpitation is small; aorta shows arteriosclerosis grade one—slightly more conspicuous finding in the abdominal portion. The anatomical portion, first, bilateral cardiac coronary sclerosis with the narrowing of the vessel luminal (lumen is inside of the vessel); second, mild hypertrophy, and third, clinical finding of angina pectoris. Angina pectoris is not a diagnosis exactly but a symptom, a syndrome, a certain picture of symptoms causing pain, severe pain in the chest usually coming after [57] eating and referred to the shoulder and down to the arm to the elbow or to the wrist, sometimes to the finger, caused by the fact that the coronary arteries do not supply sufficient nourishment to the heart muscle. From my examination, I find that to be a chronic condition. It must have existed for many years to cause as much hardening of the walls of the arteries, as the calcification, calcium deposits around the arteries, as it had. Angina pectoris is sometimes caused by infection; sometimes, too hard work, too strenuous work. Of course, shock or injuries may lead indirectly to the beginning of angina—grief. From my examination and from the autopsy I did not find any other disease except what I have stated. We did not make an examination of the spine at the autopsy. Well, my other examination was of the throat and chest and examination of the urine and

(Testimony of John F. Steele.)

sputum, of course, but I did not examine the back or spine at all.

John F. Steele testified as follows on

Cross Examination.

By Mr. WHITLEY:

In my examination of the lungs on October 10, 1931 I did not find a condition upon which to make a diagnosis of active tuberculosis. I made a notation to examine the man at some later date and put it down for observation for activity. I did not re-examine him later. I thought I would have him come in a couple of months from the time I saw him but he did not come in and died about three or four months after that. When he came to see me he asked me to take care of his case. He just came back the once,—that was really to furnish the specimens for my laboratory examination. He just came back once; I prescribed for him the second time and he phoned me a time or two. He phoned me just once—to come out to his house. I was out of the city [58] and I sent someone else. They phoned me the night he passed away. I happened to be on another case at that time so he did not get me. I was not attending him at the time of his death. From the time I examined him in October 1931 up until the time he died, I gave him medicine to take with angina. If you happen to get the right medicine, they can take it over quit a long period of time for these attacks and prevent attacks and he was taking medicine all during that time.

(Testimony of John F. Steele.)

The only diagnosis I made as to the lungs was a diagnosis of chronic pleurisy fibrous and inactive tuberculosis. I based that on the x-ray findings and on the physical examination, the type of breathing and decreased resonance and also on the increased vocal conduction over the upper part of both lungs. The difference of the findings there on the pleurisy and arrested tuberculosis, well, the pleurisy he had—nothing in that except the x-ray—the fact in the x-ray and fluoroscope, the diaphragm was caught up and did not move up and down in the fluoroscope and in the x-ray; there was quite a dense adhesion holding the diaphragm up, due to that old pleurisy with effusions, I suppose. I just gave the findings upon which I based my diagnosis for arrested tuberculosis. The fact, he had decreased resonance and bronchovesicular breathing, increased vocal conduction, prolonged respiration, both lungs, x-ray showed some old scar tissue, upper part of both lungs. In the heart condition, Mr. LaFavor gave me a history of attacks of angina pectoris, attacks of pain and starting in the chest and radiating to the arm, which were typical of angina pectoris. He did not say that word, himself, because he did not know about it but it was very similar to angina pectoris attacks. [59] I did not make any physical findings or any objective findings there that would sustain the diagnosis. Very seldom can this be done. The area of cardiac dullness was just a little bit increased, very little; about 11 centimeters is normal; his was about 12. I would not call that outside of normal limits. That is across

(Testimony of John F. Steele.)

the transverse diameter of the heart on the x-ray film and on percussion. The measurements would be within normal limits of a man's heart of his age and size. The cause of angina pectoris may be infection or overwork, overstudy, strain, grief-stricken, or anything that will bring some additional work on the heart or any additional infection on the heart. When Mr. LaFavor gave me a history of attacks of angina pectoris, he did not say the number. He said he had had attacks every year since the war, of this kind, this character. He did not say whether he had any attacks before the war,—dated back to his sickness and injury in the war. Not many people can have angina pectoris for about 10 or 12 years and have many attacks and still survive, but there are cases on record that do have. He did not tell me how many attacks he had had—he said he had had several attacks every year, from the time of the war. I was on another case and could not get there the night he died but I was still taking care of him. The doctor reported back to me after he passed away. As to the occasion for the autopsy, just as in many cases that die, we like to be sure of our diagnosis. The fact is, almost all of the patients I have that die, I ask for an autopsy and if the relatives grant it, we go ahead and do it. The fact that there was an action pending against the government by Mrs. LaFavor, I think might have had something to do with the reason why the autopsy was performed. We wanted [60] to check up on the diagnosis, to be sure. Going back to my examination, October 10, 1931, so far as I know, there



(Testimony of John F. Steele.)

aren't any objective symptoms there of angina pectoris. I have seen a good many cases of angina pectoris and once in a great while if you examine a patient just when they are having an attack, you might find some little different sound in the heart, ordinarily, but very rarely hear anything different at all, when the person is not having the attack. As to difference in sound, you might find a little murmur. You might find a murmur there that isn't there at any other time and a little sound in the valves, or there might be, present at that time and not at any other time, just when they are having the attack of pain. In angina pectoris there are not particular murmurs that you can find and are spotted as angina pectoris. In a particular examination where you find a murmur, you would not be able to call it angina pectoris. I made the diagnosis of angina pectoris on the history of the case, and knowing the man afterwards; it was confirmed by the autopsy that he had sclerosis of the coronary arteries. The first time that any physical findings were made of angina pectoris, then, was at the time of the autopsy. I think I knew at that time this action was pending against the government—I think just about that time that I knew it. The history that Mr. LaFavor gave me at the time of my examination started when he enlisted in the Army, September 18, 1917. In taking a history we usually take the childhood diseases but he did not give a history of having had any childhood diseases. On this blank, I wrote it out and gave the history as he

(Testimony of John F. Steele.)

gave it to me. I would not say for sure whether or not he gave any [61] history of having any diseases prior to service. I believe I asked about childhood diseases and he denied them. I am not sure of that, though. According to my records his history started when he enlisted in service, September 18, 1917. He did not give me a history of industrial activities; I never take that in the history, nor vocational training, either. If he had given it to me, I would have taken that into consideration. He did not tell me about being a student at the University of Idaho. He did not tell me about the period of time he spent on his farm at Colville.

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TESTIMONY OF BERTHA NEHRING,  
for Plaintiffs.

BERTHA NEHRING, after being first duly sworn on oath, testified as follows on behalf of plaintiffs, on

Direct Examination.

By Mr. McCutcheon:

My name is Bertha Nehring. I live at Tacoma, Washington—4927 North Fisher Street. I did not know Charles LaFavor during all his lifetime but I knew him for a short period. He rented a house from me from October 1928 until August 1929. The house was located at 2012 East Gregory Street. It is about a five room bungalow. Towards the last when he moved out, I got \$15.00 a month but at

(Testimony of Bertha Nehring.)

first I got more rent for it. That was to August 1929. During that time I had occasion to see him quite often, sometimes in the home that he rented and sometimes at my home. He used to call at my home to pay the rent.

A. He always appeared nervous and easily agitated about anything.

Mr. DeWOLFE: We move to strike "easily agitated about anything" as a conclusion of law. [62]

The REPORTER: (Repeats the answer.)

The COURT: Overruled.

Mr. DeWOLFE: Exception.

The COURT: I did not understand your objection to go to that part of the answer which said "very nervous"—I understod your motion to strike to go to the statement that he was easily agitated?

Mr. DeWOLFE: That is correct, Your Honor.

The COURT: Objection overruled.

His complexion was pale. He was not fleshy. He did not carry himself so very erect as he walked. I recall an occasion in which there was some discussion about the plumbing on the rented house. He spoke rapidly. He changed the tone of his voice, whenever he was talking, I mean with reference to this plumbing. When he left my house, I do not know exactly where he went,—I don't know where he moved to. At the time he was renting from me, I did not see him do any work.

(Testimony of Bertha Nehring.)

Bertha Nehring testified as follows on  
Cross Examination.

By Mr. DeWOLFE:

I saw him about once a month when he came to pay the rent, and sometimes a little over. Oftentimes I came up to the home on business. I would see him approximately once or twice a month. He was pale and the tone of his voice changed. I did not see him much after 1929. I did not see him previous to 1928. Of my own knowledge I don't know anything about him previous to that time. [63]

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TESTIMONY OF JAMES ELLIOTT,  
for Plaintiffs.

JAMES ELLIOTT, after being first duly sworn on oath, testified as follows on behalf of plaintiffs, on

Direct Examination.

By Mr. McCUTCHEON:

My name is James Elliott. I live on East 72d Street, Tacoma, Washington. I live a little better than 80 rods from where Mrs. LaFavor now lives. I am a laborer. I have lived there about five years, something like that, maybe a little more or a little less. I met Charles LaFavor the first time before he moved out on that place there. I met him three years ago—I can't tell you exactly. I do not know where he was living at that time. That was before he moved out. After he moved out to the place, I might have seen him once a week; might have seen him

(Testimony of James Elliott.)

four or five times a week. I never saw him doing much of anything. He did not have a very good complexion. I could not say as to how he carried himself; I think he limped a little bit in one leg. I can't say which one that was. I did some blasting for him; I blasted on my own and on his place. I would say I did that two years ago, something like that, I can't tell exactly. I think I was there blasting half a day or maybe better—I don't know just how long I was there. I shot a box of dynamite while I was there. I was blowing stumps. I put 8 to 20 sticks under the stumps—that is pretty hard to tell. When the explosion went off it was necessary for me to get away from the stump. I went about 12 to 15 rods away. I would say that Mr. LaFavor was not there with me. He was not helping me blast. He was there; he would not touch it at all. Said he was afraid, made him sick, didn't want anything to do with it, whatever. [64] When the blast would go off, he went out to the road and went up the road better than 80 rods and when he got out on the road he held his hands this way (indicating) and told me not to shoot the dynamite too close until he had plenty of time to get away.

James Elliott testified as follows on

Cross Examination.

By Mr. DeWOLFE:

I have had about 30 years experience blasting. Lots of people, in my experience, who have not had experience in it are afraid of that blasting. I am

(Testimony of James Elliott.)

afraid of it, myself; I want to get away from it. I met Mr. LaFavor about three years ago. He did not move out in my neighborhood; he came and worked on the place. When I first got acquainted with him, he stopped at my place and asked me if there was any more land around there and I told him there was no more, except over the hill. I can't tell you when that was. When he bought that land, I will say I saw him once a week. I saw him up until he died.

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TESTIMONY OF BESSIE ELLIOTT,  
for Plaintiffs.

BESSIE ELLIOTT, after being first duly sworn on oath, testified as follows on behalf of plaintiffs, on

Direct Examination.

By Mr. McCUTCHEON:

My full name is Bessie Elliott. I am the wife of James Elliott. I recall when my husband was blasting for Charles LaFavor; I went with him.

Q. Will you just tell the jury how Charles LaFavor acted before and after the blasts were set off?

A. Tell how he acted?

Q. Yes? [65]

A. Well, my husband, he dug holes and set the blast and Mr. LaFavor says "Here's where I am going to get out of here" he says——

(Testimony of Bessie Elliott.)

Mr. DeWOLFE: (Interrupting) I object to that as self-serving.

The COURT: It seems to be a statement made, accompanying an act as explanatory of the act; objection overruled.

Mr. DeWOLFE: Exception.

The COURT: Allowed.

He says "Here's where I am going to get out of here because powder makes me sick and bursts my head to hear the report". So he ran out to the road and he ran up the road about 80 rods with his hands over his ears and was as pale as he could be. He was scared, scared very bad.

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TESTIMONY OF MARTHA M. LaFAVOR,  
Plaintiff.

Direct Examination (cont'd.)

By Mr. McCUTCHEON:

This was in April 1919. I was still living in the same place, and he was still living in the same place. We were about fifty feet apart, the houses were. From late April 1919, he walked with a cane for two months. He did not do any work. He went for a little walk about ten o'clock—he came up to see me where I was working—I was waiting on table, in a restaurant. He came up one day at ten o'clock and stayed until eleven o'clock, had coffee and lunch. He said, "I guess I will go for a little walk, then I will go home"; and at two o'clock he

(Testimony of Martha M. LaFavor.)

came up there and met me and then we both walked together and he went and laid down to sleep and I went on home and done my ironing, washing or whatever I had to do. He used the cane for three months, May, June and July. Then he just laid around, go- [66] ing for a walk. His mother was sick. He did not go to work. I don't know whether he worked before he was married. I never saw him work. We were married March 28, 1920, at Scobey, Montana. From the time of his discharge, April 21, 1919, to March 28, 1920, he did not do any work; I never saw him do any working. I saw him every day. After we were married we lived in the same place until November 1st when he was called, October 14th, to Spokane for vocational training. From March 28, 1920 to October 1920, he worked from the first of March until the last of September, 1920—was helping in the flour mill sewing sacks. He was sitting down when he was sewing those sacks. I went to the flour mill with him and saw him work. I saw him sitting down sewing. He worked three hours a day, sometimes four. He went down there to work at eight o'clock and came home at ten o'clock; had a lunch, then went down again; came home and had dinner, then he came at two o'clock, came home again and had another lunch. I gave him the lunches. From March until September 1920 he averaged about three or four hours a day on that job. He did not work for a power company that I know of. He worked about four hours a day on the average.



(Testimony of Martha M. LaFavor.)

During that period when he was sewing sacks he did not do any work around the house because there was nothing to be done there. He laid down in the daytime, for an hour at a time. He would lie down after he had his little lunch. In September 1920 the government sent him to Spokane for taking training—vocational training. I did not go with him. At Spokane he went to high school; he had to take a smaller course; then they gave him a bookkeeping course, at Spokane. He was in Spokane from October 31st until March 1922. He was in Spokane from October 1920, all of [67] 1921, up to March 1922. He was drawing \$150.00 a month from the government then. I visited him while he was in Spokane; we lived there. We moved to Spokane on November 7, 1920. I did not go when he first went. I followed about a month later; he left on the 14th of October, I followed November 7th. He went to the Sacred Heart Hospital in July 1921. I was living in Spokane at that time. The government sent him to the Sacred Heart Hospital to have his tonsils taken out. He was there one week. Before he went to Sand Point he was not in the hospital any more but the nurse came out and saw him every month, came up to our home, while he was in Spokane taking vocational training. He went to Sand Point in March 1922. I did not go with him to Sand Point. I had to stay home; we had a small baby. We had two babies at that time. I heard from him at Sand Point. He was at Sand Point about two months. After he had been in Sand Point, Idaho two months he

(Testimony of Martha M. LaFavor.)

came home and was sick. When he came back from Sand Point, Idaho, he weighed about 135 pounds. After he came back from San Point, Idaho, he stayed home until the government could find him another place. That was about a month. Then he went to Moscow, Idaho. I went with him. At Moscow they gave him some more vocational training,—poultry. There was an experimental station down there. I remained in Moscow, Idaho until 1923, on the 20th of February. During the time we were living in Moscow, Idaho, and he was taking training at the experimental station, he went down there at nine o'clock in the morning and he came home at noon and then rested for two hours, laid down and then went back again until four o'clock and come home. He did not do any work at home. The nurse continued to visit him. At that time he was receiving \$105.00 compen- [68] sation for vocational training. We stayed there until February 1923. Then Mr. LaFavor and I moved to Colville, Washington. We lived in town for two months and in the meantime, while he was—the government told him to take a rest and look around and see if he couldn't find a place. So he found the little place of four acres; about four acres and we paid so much a month on it; there was a mortgage on it. The government sent him a wagon, a cutter, harrow, plow and harness. At that time when we moved on the little farm at Colville he weighed 127 pounds. At first the government nurse

(Testimony of Martha M. LaFavor.)

came out once a month; then she came out once every two months. We lived on the four acre ranch at Colville from 1923 to 1928. We have three children. At the time we were on the farm they were small babies. When we moved out the baby was only a month old. During those five years on the little farm near Colville, Washington, Mr. LaFavor did not do any work; I had to do the work. There was some plowing, some gardening work to be done. We had one cow, fifty chickens, one horse. I milked the cow, looked after the chickens, did the washing. He helped me with the children. During that five year period he did not work out for anybody else. He never worked for anybody else from the time I married him other than that job of sewing sacks. During the winters of 1924, 1925, 1926, 1927, 1928, while we were on the little ranch at Colville, my husband came to the Cushman Hospital every winter; spent the winter in the Cushman Hospital, for a period of three or four months. The second time, three months, then four, then two. This happened every year since 1924. When he came back from the trips to Cushman, at times he came back apparently improved in his physical appearance and health, and [69] at times he was worse. In 1927 when he came back, he came back with a cane. We sold the little place in 1928. We got \$600.00 for it,—\$400.00 for our equity. We came to Tacoma in 1928 direct from Colville. From 1928 to 1931 we lived on South

(Testimony of Martha M. LaFavor.)

Park Avenue; we rented from Mrs. Nehring, the lady who was on the stand. We rented for one year and then we rented from a man by the name of Dodd. We were still receiving compensation from the government—\$72.45. During that period my husband did not do any work. He was just doing something to keep his mind up; we lived in town; he was sitting down; and he only weighed 128 pounds then. He had lost weight. He weighed 128 pounds in 1929. He moved out to a little ranch on East 72d Street, where I now live. He moved out there July 7, 1931. That place consisted of nothing but a piece of raw land, ten acres. We paid \$15.00 a month for it. I don't know how much we paid down but the man we rented from, he knows. We made installment payments. There were no buildings on it. A building was not built on it. The house where I am now living, I did most of the building. My husband helped me a little. We hired Mr. Elliott to help us. Mr. Elliott helped. It is just a little shack, two little bedrooms. The little kitchen isn't finished yet. Mr. Sykes did some work on it. It isn't finished yet, no bathroom, no running water in the house. I did not acquire any stock or chickens out there, I haven't got anything. My husband started this case against the government in 1928. He died January 11, 1932. During the twelve years we were married, I never saw my husband do any heavy manual labor. During those twelve years he received compensation

(Testimony of Martha M. LaFavor.)

from the government. When he died it was \$72.45. I did not receive \$3,000.00 of in- [70] surance on the converted policy; I put in my claim. They would not let me have it until three weeks ago, I put my claim in; about two weeks ago, I put the claim in. I have been trying to get it ever since he died. During the periods when we were living in Scobey, Montana, and then in Spokane, my husband was there, and while we were in Moscow, and while we were on the farm in Colville, my husband manifested extreme anger towards me—he was worse in 1923 when it started. The first time was in 1923. We were then in Colville, Washington. The occasion was his rundown condition. He flew off the handle, quick, got excited. He abused me.

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TESTIMONY OF E. C. WHITLEY,  
for Plaintiffs

E. C. WHITLEY, an adverse witness, after being first duly sworn on oath, testified as follows on behalf of plaintiffs, on

Direct Examination

By Mr. NEWMAN:

My name is E. C. Whitley. I am an attorney,—for the United States government. I have the service records of Charles LaFavor, deceased, in my custody. I have them in my custody now. That is the com-

(Testimony of E. C. Whitley.)

plete record of Mr. LaFavor's entire military service (hands documents to Mr. Newman).

Whereupon plaintiffs' exhibit #14, after being identified, was offered and admitted in evidence without objection.

Mr. NEWMAN: (Reads excerpts from exhibit #14.)

Mr. DeWOLFE: I would like to read briefly a few parts that were not read, in order to save time. Whereupon Mr. DeWolfe continues to read from plaintiffs' exhibit #14. [71]

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TESTIMONY OF MARTHA M. LaFAVOR,  
Plaintiff

Direct Examination (cont'd.)

By Mr. McCUTCHEON:

Yesterday at the time I left the stand I spoke about my husband having spells. They came on about two days before he got them. Two days before he got them he had an awful headache before the spells came. About two days before he got these spells he would have an awful headache and his mind was somewhere else, and he would go on talking to himself; it would take two or three days. I would say something to the children and he would fly right up, and he came and pulled my hair and hit my face and when he got over those spells he would lie down and sleep two or three hours.

(Testimony of Martha M. LaFavor.)

Q. How long would the spells last?

A. They would come on two days before he got them.

Q. Yes?

A. And then when he got through abusing me,—

Q. What did he do?

A. He would lie down and sleep, and when he woke up he said “Where did you get those bruises?” I said, “Don’t you know?” and he said he did not know.

Mr. DeWOLFE: I will object to that. There is no mental disability pleaded.

The COURT: Objection overruled.

Mr. DeWOLFE: Exception.

He was just as nice as he could possibly be afterwards. That was along in 1923 until the last of September, 1931, he kept that up. [72]

He did not go to sleep the first part of the night. I had to rub his legs, I had to rub his back and his arms. I rubbed his back with wintergreen liniment. I rubbed him until he went to sleep, and then I went to sleep and all at once he was raving like he was in the war. And then he would say, “I must roll over on my left side”. And he would then say, “Gee, I had an awful fight”. And then the next morning he slept until ten o’clock, and then he got up and walked around. That started ever since he and I were married. While I was asleep I put my arm around him this way (indicating) and let my face to his back

(Testimony of Martha M. LaFavor.)

(indicating) and he said, "Don't lay your arm there". That started the first night we were sleeping together, when we were first married. I had a number of photographs. This one (plaintiffs' exhibit No. 1), he brought it to me, when he was discharged. My husband is the man there with his hand to his face.

Whereupon plaintiffs' exhibit No. 1, was offered and admitted in evidence over the objection of the defendant on the ground that it was not properly identified, and exception was noted.

(Plaintiffs' exhibit No. 2, a photograph, handed to witness.) He had it taken and he gave it to me,—before the war. I was not there when this picture was taken. He is the man with the saw,—no, that is his father. My husband is on that picture. That was 1910. I know him in the picture.

Whereupon plaintiffs' exhibit No. 2 was offered and admitted in evidence over the objection of the defendant on the ground that said exhibit is too remote and not within the issues in this case, and objection was noted. [73]

Mr. DeWOLFE: We will admit that the youngest man in the picture is her husband.

(Plaintiffs' exhibit No. 3, a photograph, handed to witness.) That is myself. That picture was taken on the four acre ranch. That is myself. The picture was taken in 1926.

Whereupon plaintiffs' exhibit No. 3 was offered and admitted in evidence over the objection of the



(Testimony of Martha M. LaFavor.)

defendant on the ground that said exhibit is immaterial and not a picture of Charles LaFavor, and exception was allowed.

(Plaintiffs' exhibit No. 4, a photograph, handed to witness.) That is my husband in 1931 at Lake Geneva. I took the picture.

Whereupon plaintiffs' exhibit No. 4, after being identified, was offered and admitted in evidence without objection.

(Plaintiffs' exhibit No. 5, a photograph, handed to witness.) That is my husband and the children. It was taken in 1930. I took the picture.

Whereupon plaintiffs' exhibit No. 5, after being identified, was offered and admitted in evidence without objection.

That is my husband (pointing to plaintiffs' exhibit No. 6). It was taken on Armistice Day in 1919. I did not take the picture,—I was there.

Whereupon plaintiffs' exhibit No. 6, after being identified, was offered and admitted in evidence without objection.

(Plaintiffs' exhibit No. 7, a photograph, handed to witness.) That was taken at Fort Lewis in 1917. It is my husband. [74]

Mr. WHITLEY: Did you take the picture?

The WITNESS: No.

Mr. WHITLEY: We object to it.

The COURT: The means of knowledge not being shown, the objection is sustained on the bare statement.

(Testimony of Martha M. LaFavor.)

Q. Did you recognize that photograph?

A. Yes.

Q. When did you receive it?

A. When he was at Fort Lewis.

Q. How did you receive it?

A. In the mail.

Q. The regular way?

A. Yes.

Q. Do you know his handwriting?

A. Yes.

Q. Was it addressed to you?

A. Yes, sir.

Mr. WHITLEY: Is that his handwriting on the back?

A. Yes.

Q. Where was this?

A. At Spokane.

Q. Spokane, Washington?

A. Yes, before he got so bad that I had to work,—

Mr. DeWOLFE: I will object to that, and will move that the answer of the witness be stricken.

The COURT: The Court will not undertake to separate the admissible parts from the inadmissible. So the entire answer will be stricken, and you are instructed to disregard it. [75]

(Plaintiffs' exhibit No. 10, a photograph, handed to witness.) I recognize my husband in that picture. I received it in 1917. He gave it to me in the early part of the spring, and I met him in May.

(Testimony of Martha M. LaFavor.)

Whereupon plaintiffs' exhibit No. 10, after being identified, was offered and admitted in evidence without objection.

(Plaintiffs' exhibit No. 9, a photograph, handed to witness.) That was taken July 1, 1929 at Point Defiance Park. I took the picture. My little girl and the neighbor's baby, two months old, are in the picture. That is Mr. LaFavor there (pointing).

Whereupon plaintiffs' exhibit No. 9, after being identified, was offered and admitted in evidence without objection.

(Plaintiffs' exhibit No. 19, a photograph, handed to witness.) That was taken at Spokane, Washington in 1921. I was not there. My husband is there—he is this one (indicating) with the "x" on it. He took that training there before he could take book-keeping.

Whereupon plaintiffs' exhibit No. 19, a photograph, after being identified, was offered and admitted in evidence without objection.

(Plaintiffs' exhibit No. 18, a photograph, handed to witness.) That is my husband (pointing). That photograph was taken at the Northwestern Business College at Spokane, Washington. At that time he was being sent to school by the government.

Whereupon plaintiffs' exhibit No. 18, after being identified, was offered and admitted in evidence without objection. [76]

(Plaintiffs' exhibit No. 17 handed to witness—a photograph.) This is my husband and I. It was taken in 1920. That was when we were married.

(Testimony of Martha M. LaFavor.)

Whereupon plaintiffs' exhibit No. 17, after being identified, was offered and admitted in evidence without objection.

These spells that I spoke of, at the time when they first started, it was about two days a month, and once a month, and sometimes they went two months at a time. I was asking God to help him and I know that He answered my prayers, and all at once it would come up again. It just came on quickly. He just came home, when I was picking potatoes, and he started to speak to me, and I did not answer right away and he flared up, and how it started was the first time at Colville, Washington, in 1923. I was picking potatoes and it was a little distance up to the gate, and he went down town and came back. He came home by the gate there. I did not go to open the gate, because I thought it would be all right if he opened the gate. I was digging and picking potatoes. He came in and started to rave, and said, "Why didn't you come up and try to open the gate?" I said, "You are not doing anything; I am doing all the work. It won't hurt you any to open the gate". And then is when he pulled my hair, punched my face. That was the first time he ever laid his hands on me. He complained about his head all the time. He went and laid down. He would catch his head like this (indicating), when he had the headache. He complained about his head all the time. He took aspirin for his headache,—right along. Lots of times I forgot to take it out when I washed his clothes and they

(Testimony of Martha M. LaFavor.)

would be in the clothes. I would find a half box of [77] aspirin that I had washed up with the clothes. His headaches got worse since 1923. I saw him lose his balance and fall, that was in 1931. It was where I am living now. It was after he had had an examination at the Veterans Bureau Hospital. I think it was October 1st. At that time I was at home. He was at home. He had to go to the Veterans Bureau and have an examination. So he went down and had an examination in the morning. He came back home. He arrived home on October 1st about five or six o'clock at night. He said, "I don't want you to cook any supper. The Doctor gave me some powder, and I have to take that the last thing before I go to bed, and do the same thing in the morning, without anything to eat. He is going to give me a stomach test." He took the medicine and went to bed, and then went to Seattle. He lost his balance afterwards. The first day he left for Seattle, I saw him take the powders. He came back the next day. He did not eat anything the first night when he came back home. He did not eat any breakfast. The night before he ate a light supper. The second night after he came home he ate a light supper. He went to bed. The next morning he ate some breakfast. I saw him fall down two weeks afterwards. He was sitting in the chair, in the kitchen,—at eight o'clock in the morning. He said, "Gee, I don't feel good. I am awful weak. Get me some water", and I went after the pail to get him a drink, and he fell right flat on the floor.

(Testimony of Martha M. LaFavor.)

He fell forward, on the left side and cheek, and he laid there until I bathed his face with cold towels and I rubbed him and he came to, and he said "Help me up", and I helped him up. And he said, "I am going to the lavatory". I watched him and he came back in and he said, "I am awful weak". And I told [78] him he should lay down, and he got up and laid down. And all that day he was not able to walk.

Mr. DeWOLFE: I move that the last part of the answer be stricken. I will object to this line of testimony on the ground there is nothing in it within the issues, and on the further ground that this testimony is burdening the record.

The COURT: The statement that he was not able to walk will be stricken. Otherwise the objection is overruled.

Mr. DeWOLFE: Exception.

The COURT: Allowed. That is, the objection made to the entire line of testimony is overruled.

Mr. DeWOLFE: Exception.

The COURT: Allowed.

I have observed my husband vomit,—just before he was eating in the morning. It started ever since I knew him, and he had to have a lunch at ten o'clock, and then a lunch at twelve o'clock and then a lunch at two o'clock. He could not eat very much at a time. It did not happen before the war. It was after he came back from the war. He vomited after he got through eating. He could not keep anything on his stomach. That did not occur every day,—two

(Testimony of Martha M. LaFavor.)

or three times during the month. After we were married our hours for eating that were not regular were ten o'clock and two o'clock. Before ten o'clock in the morning we had breakfast. He just ate a little bowl of mush. He would have something to eat again at ten o'clock, some coffee and light stuff. Then I served him again at lunch time, at noon. He ate a light lunch. At two o'clock he had a light lunch again. He never could eat heavily. That [79] is why he had to eat so often. At Colville I did the work. My husband died January 11, 1932. I was at his bedside when he died. He was able to talk up to the time he died. He had a heart attack. The first one occurred after he had had his examination at the Veterans Bureau. He had the last one in the evening as he was taking a bath. He was fainting, and he said, "Help me out". I helped him out and he said, "If I ever have another attack like this one, it will be the last of me". This was on January 11th when he died. On the evening of the 10th he was sitting at the table watching the boy washing his hair, and he went and washed the boy's hair. He had an attack that evening. When the children went to bed, he went to shave. That was above eight o'clock. At nine o'clock he was going to take his bath, and he started to wash his hair. He said, "I believe I have another spell coming on. I am going out." And he went out and came back and said "It seems like my bowels have stopped to move". He then said, "Fix me an enema", and I fixed him an enema and he kept walking the floor

(Testimony of Martha M. LaFavor.)

and holding his heart like this (indicating), and he said, "I can't walk any longer. I have to go and lay down". And he said, "Animals, when they get sick, they don't lay down, and I should not". And he said, "Take the windows out of the house so I can get some breath". I took the windows up and raised the pillows so he could breathe. That was at ten o'clock. That night he laid down and slept. All at once he said, "I can't stand it. It is choking me. Lay me down, and get some cold rags and put on my heart". And he said, "My arm is paining me so. Get some liniment and rub it". And I rubbed them and he lay down with eyes shut, and he said, "My arm is [80] paining me so". I said, "I will get the cold water bottle and put it on your chest while I get some cold rags and wring them". And when I came back he went like this (indicating): ah, ah, ah! He did that three times, and he raised straight out of bed. I was going to get the doctor and he said, "Don't, I will be all right". I said, "I am going to call for the doctor". I was with him all of that night until he was gone. That same evening at eleven thirty he lost consciousness. After he lost his breath he could not speak. He never spoke again. I assisted him in taking enemas,—he had trouble right along. The worst was since 1925, and from that time he always had to be massaged. I had to massage him.

Mr. DeWOLFE: The government will stipulate that the jurisdictional record of disagreement exists, and also that she is the qualified executrix.



(Testimony of Martha M. LaFavor.)

Mr. McCUTCHEON: Plaintiff's exhibit No. 20, is a certified copy of the Letters of Administration,—oh, counsel is waiving that.

The COURT: What date?

Mr. McCUTCHEON: November 28, 1932.

The COURT: Appointing this witness,—

Mr. McCUTCHEON: Appointing Mrs. LaFavor.

I am the regularly appointed administratrix of the estate, appointed by the Court. I still am,—it has never been revoked.

Whereupon plaintiffs' exhibit No. 20, after being identified, was offered and admitted in evidence without objection. [81]

The plaintiff, Martha M. LaFavor, testified as follows on

Cross Examination.

By Mr. DeWOLFE:

My husband originally had a ten thousand dollar policy of term insurance.

Q. And as far as you know he paid no premiums on that policy subsequent to his discharge from service?

Mr. McCUTCHEON: We admit that.

As far as I know he paid no premiums on that policy since the date of his discharge. My present dispute with the government is only on seven thousand dollars of that insurance. As to the other three thousand dollars, I am the beneficiary of two thousand dollars, and his mother of one thousand dollars,—he changed his mother to me. And then the three thousand dollars was converted. The three

(Testimony of Martha M. LaFavor.)

thousand dollar policy was in force until the first of February. My claim is for seven thousand dollars, that is, deducting the three thousand dollars which was later converted. Ever since 1932, I think it was in February, I have been negotiating with the government for payment of the three thousand dollars insurance.

Q. And the government has indicated that the three thousand dollars is in line for payment when the trouble between you and the mother is ironed out?

A. I was the beneficiary.

The government has not disputed liability on the three thousand dollars. My husband never did any work in Colville in 1928. In Colville he was getting \$105.00 compensation from the government. When he came back from Colville they deducted it to \$72.45. I don't remember the training [82] pay. He got \$105.00 compensation. That is my husband's signature there (indicating signature on government exhibit A-1). That is his signature on the top there.

Whereupon defendant's exhibit A-1, after being identified, was admitted in evidence, without objection.

The one dated April 29, that is his signature. That looks like my husband's signature and his handwriting.

(Mr. DeWolfe reads from defendant's exhibit A1).

In 1923, on April 29, 1923,—I was there at that time. According to my best judgment, that report

(Testimony of Martha M. LaFavor.)

is made out in his handwriting. He did some work. He had to do some to keep his mind up or he would go unbalanced. [83]

The report of May 19, 1923,—I never left. That is his handwriting. The body of the report looks like his handwriting. All these reports I have seen are in his handwriting.

Mr. Manning was the representative of the United States Veterans Bureau who supervised the trainees in this work. The report of January 26, 1924 looks like his handwriting. That is his signature on the back. [84]

Q. Now, skipping down to May 24, 1924, was this his handwriting again?

A. Yes. [86]

(Mrs. LaFavor handed defendant's exhibit A-2.) According to my best judgment that is Mr. LaFavor's signature.

Whereupon defendant's exhibit A-2, after being identified, was admitted in evidence, without objection.

(Defendant's exhibit A-2 read to the jury by Mr. DeWolfe.)

That is my husband's signature on government's exhibit A-3, on the back.

Whereupon defendant's exhibit A-3, after being identified, was admitted in evidence, without objection.

I was married March 28, 1920. I never saw him work before we were married.

(Testimony of Martha M. LaFavor.)

(Mr. DeWolfe reads Government's exhibit A-3 to the jury.)

He never worked in the power plant that I know of. Before we were married I never saw him work in the flour mill. I did not see him working. In January 1920 he went to the Northwestern Business College. He quit his employment in the flour mill at Scobey, Montana, December 20. He used to come home at night when he was working at the flour [87] mill. (Defendant's exhibit A-4 handed to witness.) That is my husband's signature.

Whereupon defendant's exhibit A-4, after being identified, was admitted in evidence, without objection.

(Defendant's exhibit A-4 read to jury by Mr. DeWolfe.)

My husband was sick about the fall of 1925. He was in the hospital. I think he went to the hospital on February 27th, 1925; he left February and he stayed until May. It was in 1925. From September to December, 1925, he went again; he was twice in the hospital in that year. He was in the hospital from September to December 1925, at Cushman. I remember that year he had to go twice. I don't remember exactly the number of months he was in the hospital. As to where he was in October, November and December, 1925, whether he was in the hospital or on the ranch at Colville, I don't remember. I had so much sickness I could not remember that. In 1925, I know, in the Spring, just what date it was. It was on February 27th and then he came

(Testimony of Martha M. LaFavor.)

home in the middle part of May and then in the Fall they sent for him to come into the hospital again. In the Fall he was in the hospital two or three months, or four months. I don't remember what date he went to the hospital. That was in 1925. It was in December if I remember right. Prior to that, September, October and November, he had stayed at home at Colville. I remember that now, 1925. His nephew was there at that time, September, October and November. His nephew did the work. For about three months prior to December 1925 the nephew and I did the work on the ranch, and prior to that three-months period my brother was doing it. My husband helped a little. (Defendant's exhibit A-5 handed to witness.) That is my signature, that is my letter. [88]

Whereupon defendant's exhibit A-5, after being identified, was admitted in evidence, without objection.

(Mr. DeWolfe reads defendant's exhibit A-5 to the jury.)

That is my husband's signature (indicating signature on defendant's exhibit A-6).

(Defendant's exhibit A-7 handed to witness.)

That is my husband's signature (indicating).

Whereupon defendant's exhibit A-6, after being identified, was admitted in evidence, without objection.

(Mr. DeWolfe reads defendant's exhibit A-6 to the jury.)

(Testimony of Martha M. LaFavor.)

Whereupon defendant's exhibit A-7, after being identified, was admitted in evidence, without objection.

(Mr. DeWolfe reads defendant's exhibit A-7 to the jury.)

Whereupon defendant's exhibit A-8, after being identified, was admitted in evidence, without objection.

(Mr. DeWolfe reads defendant's exhibit A-8 to the jury.)

Whereupon defendant's exhibit A-9, after being identified, was admitted in evidence, without objection.

I never saw him work. That is his signature (indicating signature on defendant's exhibit A-10).

Whereupon defendant's exhibit A-10, after being identified, was admitted in evidence, without objection.

(Mr. DeWolfe reads defendant's exhibit A-10 to the jury.) [89]

I do not remember that my husband had an adjusted compensation certificate. He had a certificate on which he borrowed money. I was paid on that \$600.00 after he died. Before he died he borrowed approximately that during his life, but not at one time. I recall Mr. LaFavor having worked at the flour mill at Scobey, Montana, after we were married. He started working at the flour mill March 1st, 1920. We were married March 28, 1920. He went to work several weeks before we were married,

(Testimony of Martha M. LaFavor.)

—he went to work in the flour mill. He continued working there until September. I don't remember what he got. I do not have any knowledge of his employment at a plant in April, 1919. At that time I saw him every day. He left Scobey, Montana, October 14, 1920 to go to the Northwestern Business College at Spokane, Washington, and he stayed there until about March, 1922, taking vocational training for the government. He received training pay during that time from the government. The government paid for his books and supplies at the school, at the business college. I think they paid for his education at the school. I don't remember if he paid for it. After he got out of the business college training he went on the McPherson Poultry ranch; that was at Sand Point, Idaho. He helped with baby chicks. I don't know how long he stayed with McPherson. He did not go from there right away. I think it was in August that he went to the University of Idaho; I don't remember the month, but it was that Fall, or the latter part of the summer. I know it was that Fall. In the summer of 1922 he took a rest. The government told him to take a rest in the meantime, and they were looking something up for him to do. He continued at the University of Idaho until 1923,—I think it was the [90] last of January. He left March 20th; the baby was one month old, and before he went to Colville. We had to take our trunks and move them. We went to Colville. The government paid his tuition at the Uni-

(Testimony of Martha M. LaFavor.)

versity of Idaho and I suppose the government supplied his books. He got training pay, too. It was in June, 1922 that the ranch was purchased at Colville, Washington. We had it before March, 1923. The government told him to look around and find a place. We moved onto the ranch in May. We left town. We lived in town two months. That was May, 1923. We stayed there until 1928. The government furnished a wagon, a harrow, plow—I think that was all. They gave him that to go on the place and work when he felt like it. They gave him practically everything. I know Mr. Bloom. He lived there. My husband never worked with him, neither on our house or any other place. In June, 1924 he was over on the ranch at Colville. I don't remember that he hurt himself at any time in 1924 with a sack of grain falling out of a loft; I don't remember that he hurt himself at any place in that vicinity during that year.

The plaintiff, Martha M. LaFavor, testified as follows on

Re-direct Examination

By Mr. McCUTCHEON:

I think he paid fifty dollars in 1922 when he got the place at Colville. I would say the monthly payments were fifteen dollars a month. (Plaintiffs' exhibit No. 21 handed to witness.) That is my husband. It was taken in Colville, Washington, in July, 1927. Those are my children (indicating). [91]



(Testimony of Earl C. Whitley.)

Whereupon plaintiffs' exhibit No. 21, after being identified, was offered and admitted in evidence, without objection.

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EARL C. WHITLEY,

an adverse witness, having been recalled as a witness on behalf of plaintiffs, testified as follows on

Direct Examination

By Mr. McCUTCHEON:

I know R. L. Popwell. He is educational advisor of the United States Veterans Administration at Seattle, and he is now and has been such advisor since 1924, to my knowledge. (Plaintiffs' exhibit No. 23 handed to witness.) That is not his signature. I worked in the United States Veterans Bureau from 1925 to 1933. During that period I was familiar with the routine of the office. I do not know that signature. It is customary for someone in Popwell's office to sign his name. I would say that plaintiffs' exhibit No. 23 is a letter dated April 6, 1925, purporting to be sent by R. L. Popwell's office, Chief of the Claimant Division, from the office I was formerly in,—at Seattle. From this, I could not tell whether or not that was sent out in the regular course of the mail. That is his name that is signed to it. I do not know whether or not I have a copy of plaintiffs' exhibit No. 23 in my file. Plaintiffs' exhibit No. 24 is a letter dated February 15, 1927 from R. L. Popwell,

(Testimony of Earl C. Whitley.)

Chief of the Claimant's Division, Seattle, Regional Office, addressed to Mr. LaFavor. That is his signature.

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Whereupon plaintiffs' exhibit No. 24, after being identified, was offered and admitted in evidence, without objection. [92]

That (plaintiffs' exhibit No. 25) is a letter dated March 13, 1926, addressed to Charles LaFavor, Colville, Washington, bearing the name of R. L. Popwell, but not his signature.

(Mr. McCutcheon reads plaintiffs' exhibit No. 24 to the jury.)

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DEPOSITION OF JOHN M. GILBO,  
witness on behalf of plaintiff, read to the jury,  
as follows:

My name is John Martin Gilbo. I live at 4515 South Tacoma Avenue. I was in the military service during the World War. I was acquainted with Charles V. LaFavor. I met him at Demartin, France, in 1918, the latter part of August. The day I got acquainted with him he was not feeling very good. He was rubbing over the left part of his breast. I met him through the sergeant of Company A. He told me there was a man in Company A from the same place I was from. I was in the same regiment. In France I knew him between two and three weeks. Close to three weeks

(Deposition of John M. Gilbo.)

after I met him, I left. The next time I met him he was complaining about the pain in his breast. He mentioned about his left side. I first met him in Demartin in a little store near the company headquarters,—it was Sunday afternoon. He went to my company with me and we had dinner there. It was after he had eaten that he complained about feeling ill. Then he started back to his own company. The second time I saw him I met him near a little water hole. We were going in swimming but the hole was full of weeds. Then we went to the barracks. He said he did not want any lunch, he had some with him. So he stayed there while I ate. He mentioned he did not feel well on his left side but he did not mention his heart direct. I saw him about four times. [93] The next time I saw him was when I went through on a truck. I did not speak to him very much then. The next time I saw him was when we had a divisional meet. There was not much said. That was the fourth time. We just talked about the trip. The first time I met him he was glad to see me. He did not do much of anything. I did not see him again in France after we left there. The next time I saw him was in 1926, at the Cushman Hospital,—he was a lot more sickly and peaked. I notice a change in his appearance—he was a lot paler and thinner and was limping a little. I was there at Cushman Hospital most of 1926; he was there quite a few weeks while I was there. He mentioned his heart once at that time. He said he figured that his heart was on the

(Deposition of John M. Gilbo.)

bum at that time. At my first meeting with Mr. LaFavor in France, I do not know of anything unusual taking place.

John M. Gilbo testified as follows on

Cross Examination.

By Mr. WHITLEY:

The last time I saw Mr. LaFavor in France was when I was on the divisional hike with him. I was in Company B and he was in Company A. It was the divisional meet, the whole division. They said the hike was forty-one kilometers. I think a kilometer is five-eighths of an American mile. That would be about twenty-five miles, I think somewhere around that. That was the latter part of August, 1918, and I was discharged in April 1919. Just a month or so before the Armistice. That was the last time I saw Mr. LaFavor until 1926. That last time I saw him in France, some of them were in a bad fix. I could not say just how bad he [94] was. I do not know whether he went back with them or not. I went back on the truck. I do not know whether he went back with them. The last time I saw Mr. LaFavor was just shortly before he died, in 1932.

John M. Gilbo testified as follows on

Re-direct Examination.

By Mr. NEWMAN:

When I saw him in France, that was in August 1918, I could not state just the day.

EARL C. WHITLEY,

recalled as a witness on behalf of plaintiffs, testified as follows on

Direct Examination.

By Mr. McCUTCHEON:

I did not find a carbon copy of plaintiffs' exhibit No. 23 in the files. There are numerous files. It would take me sometime to go through them. R. L. P. represent Mr. Popwell's signature, whether he actually signed it or not. The other initials "J. I. N." represent the initials of the person dictating the letter. The other initials there represent the stenographer who wrote the letter. I can't recall anyone in the office with that initial "J. I. N.". "L. M. T." represents the stenographer who wrote the letter. There have been many stenographers there and that has been some time ago. I cannot say I know who L. M. T. is. The figures "C 15469" represent the claim number of Mr. LaFavor. If I had received that letter, my opinion would be that it probably came from the office I was formerly in.

Mr. McCUTCHEON: Plaintiff has filed a general denial of the defendant's answer.

The COURT: It may be filed. [95]

Whereupon plaintiffs rested at which time the following motion was interposed by the government:

Mr. DeWOLFE: The government moves for a non-suit on the grounds that the evidence of the plaintiffs has failed to make out a prima facie case

(Testimony of Earl C. Whitley.)

sufficient to warrant the submission of the issue to the jury; on the ground that the plaintiffs' evidence has not made out a prima facie showing of total and permanent disability within the meaning of the law of disability during the time the insurance was in force and effect; and on the further ground that the evidence adduced affirmatively shows that during the time the insurance was in force and effect, he was not totally and permanently disabled. I would like to be heard for a moment upon the question.

Which motion was denied by the Court and exception noted on behalf of the government.

Whereupon the defendant proceeded with its case.

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TESTIMONY OF B. F. WESTMORE,  
for Defendant.

B. F. WESTMORE, after being first duly sworn on oath, testified as follows on behalf of the defendant, on

Direct Examination.

By Mr. DeWOLFE:

My name is B. F. Westmore. I am president of the Northwestern Business College at Spokane, Washington. I live in Spokane. I lived there about October 1920. As president I have custody of the records of that school. I have brought with me the records pertaining to one Charles V. LaFavor. (Defendant's exhibit A-12 handed to witness) That is the registration and attendance

(Testimony of B. F. Westmore.)

money paid in on account of Mr. LaFavor's tuition and grade,—that is the record. [96]

Whereupon defendant's exhibit A-12, after being identified, was admitted in evidence, without objection.

Mr. LaFavor started a course at my school October 27, 1920. He went to school until March 1922. He took up bookkeeping, and there are other subjects, too. He took set I and set II of bookkeeping, rapid calculation, commercial law, commercial English, commercial arithmetic and spelling. The following are the grades he received: In Set I of the bookkeeping, 92; Set II of Bookkeeping, 95; rapid calculation, 95; law, 93; English, an average of 94; commercial arithmetic, an average of 97; spelling, 92; and he also took writing, an average of 90; and rapid calculation 95. The absences are shown on four days in the first week in May. I cannot say positively what year. There were other absences totalling ten days,—the second week in May, and one the fourth week in May and one in the second week of April. He was going to school there the rest of the time as far as my records show. The government was paying for it. The government paid in all for that \$301.81. That was paid to this school, during the entire period.

B. F. Westmore testified as follows on

Cross Examination.

By Mr. McCUTCHEON:

I have no personal recollection of Charles F. LaFavor.

TESTIMONY OF HARVEY BLOOM,  
for Defendant.

HARVEY BLOOM, after being first duly sworn on oath, testified as follows on behalf of the defendant, on

Direct Examination.

By Mr. DeWOLFE:

My name is Harvey Bloom. I live near Colville. [97] I knew Charles F. LaFavor. I first met him about 1923, after he moved out to the place near me. At that time he lived about a quarter of a mile from me. I first met him in the spring of the year, 1923. I saw him every day two. During that period of time I saw him plowing, working in the orchard, constructing some buildings. I saw cutting wood and hauling wood and I worked with him in the threshing. When he was plowing, I think he held the plow and his wife drove the horse. I cannot say that I have seen him plow all alone. He did carpenter work on his chicken house, and also on his house,—his dwelling house. I have seen him taking care of chickens. Mr. LaFavor and I had arrangements with regard to exchange of work. I went down and helped him two or three days on his house, and in return he was to help me out with a little pruning the next spring in my orchard. He was to show me how to do it. In one job we pitched bundles off the stack and into the machine, threshing,—both of us together. If I remember right, he got three hundred baby chickens in the first year. He had a horse, and cow or two, and some hogs. He milked the cows, I saw him milking the



(Testimony of Harvey Bloom.)

cows, and taking them to and from the pasture. I saw him from 1923 until 1928. He never looked pale to me. I never saw him limp and I never saw him use a cane. I never saw him fall down. I never saw him sick. I never heard him complain of physical disability.

Harvey Bloom testified as follows on

Cross Examination.

By Mr. McCUTCHEON:

My name is Bloom. I am a farmer, near Colville. My farm consists of forty acres. I have been there since [98] 1921. I know where the LaFavor ranch was. It was four acres. Not all of it was cleared,—a part of it was. I think about one-third of it was cleared, possibly an acre and a half. As to the rest of it,—the road takes up a part of it. There is a piece lying out in the open, and there was a hillside that was not cleared. The part that was not cleared was a portion of the hillside. When the LaFavors came there, there was a shack on it, I believe. I think it was a one-room board house. That was the way it was when they purchased it. I think he built a chicken house; until they got the other house built, they occupied the chicken house. For about three days I helped build the other house. I put the rafters and sheeting on, and put up the side. I think a neighbor helped him for a day or two. The house finally built was a three room house, one story. It did not have any water, no plumbing or bath. On that acre and a half he grew a variety of vegetables. There was

(Testimony of Harvey Bloom.)

an orchard on a part of it, possibly twenty-five trees. His agreement was that he would show me how to do the pruning. He came and did a part of it. They did not get water from me. He had some hogs. I do not know exactly how many. I would say that he had two cows. He got three hundred baby chicks the following spring. That was in 1924. I think he got the chickens in 1924. I do not know how many chickens he raised. I do not know if he increased the number or not. Sometimes I saw him every day or two, for about five years. I did not see him every week of the year; he was away at different times. I do not know how long at a time he was away. When he was around home I saw him every day or two. He was not around home when he went to the hospital a time or two. It may have been three or four times; it could have [99] been five times, I do not know. I saw him cutting wood. It was average timber that was down. We call them small trees, fir and tamarack. Just in passing, as I remember, I would see him cutting wood, just a little of the time. While he was cutting wood, I stopped and talked to him a couple of times. I did not write to the government and tell them he was cutting wood over there and asked them to investigate his compensation. I did not write to the government. I did not shut off his water. I did not have any difficulty with LaFavor. I was on the best of terms with him all the time. We never had a word about the water. The only words that we ever had were just in regard to a breachy animal,—a young cow. The cow crept through

(Testimony of Harvey Bloom.)

the fence and got into my alfalfa. I just asked him to do something about it. That was all that was done or said. I did not lock the cow up. I do not know whether my wife wrote to the government or not. The cow got through the fence in the summer when the alfalfa was growing, the summer of 1927 I think. The government sent a man to see me in this case. I don't know how they happened to send a man to see me. They sent a man to see me in 1929 or 1930. He talked to me about this case. Mr. Barr was a neighbor of the LaFavors over there. Mr. Flint is dead now. Mr. Flint lived about a mile away from the LaFavors. I think at that time Mr. Barr lived about two miles from the LaFavors. Mr. John Carlyle lived there, about three miles from the LaFavors, in town. I do not know if the investigator came to see him. I don't think I gave the government investigator a long report.

Harvey Bloom testified as follows on

Redirect Examination.

[100]

By Mr. DeWOLFE:

I did not solicit this man to come to see me. His name was Mr. Schlax, the field investigator. The incident I spoke of about the cow has not caused me to change any of the facts in the case.

Harvey Bloom testified as follows on

Recross Examination.

By Mr. McCUTCHEON:

Mr. Fortune was also a neighbor. He lived about a quarter of a mile from the LaFavors. Also Mr.

(Testimony of James J. Mellinger.)

Fay, about a mile. The Stankeys were also neighbors; they lived about half a mile away. That is about all the neighbors around there.

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TESTIMONY OF JAMES J. MELLINGER,  
for Defendant.

JAMES J. MELLINGER, after being first duly sworn on oath, testified as follows on behalf of the defendant, on

Direct Examination.

By Mr. WHITLEY:

My name is James J. Mellinger. I am secretary of the Mellinger funeral parlor. I have custody of the records. I have the records concerning the funeral and burial of Charles V. LaFavor in January 1932. I have our sales sheet and our call sheet. (Defendant's exhibit A-13 handed to witness) We have a call sheet we make in getting the information of the deceased, and necessary material for the certificate of death, which must be gotten shortly. This is an original record, made in the ordinary course of business. Mr. L. L. Miller made that particular one. He was authorized at that time to make them.

Whereupon defendant's exhibit A-13, after being identified, was admitted in evidence, without objection [101]

(Defendant's exhibit A-14 handed to witness.)

When we receive a call, we have a regular set form, getting the name and the time of death and

(Testimony of James J. Mellinger.)

the residence where the person passes away; also the date of birth, where he last worked, what his occupation was, his birth place, the birthplace of his father, the maiden name of his mother, the full name of his wife and children, church affiliations of the deceased, former residence, and cause of death, and so forth. That is an original record. Mr. Thompson made it; he works for us. It was made in the general course of business. Defendant's exhibit A-13, that is an original record. From my own knowledge the entries were made between the 11th and 14th of January. The entry of January 13, 1932 was put on today. I made that entry myself. That is my own handwriting. I was connected with the firm in January 1932. I would not swear to it that an autopsy was performed at the undertaking parlors. All the entries, except the last entry which was made today, were made at the time of the transaction. I did not talk to Dr. Steele about this case today or yesterday with reference to autopsy.

Mr. WHITLEY: I would like to at this time publish and read the deposition of George Johnson.

The COURT: Let it be read.

Mr. WHITLEY: The deposition was taken on notice, if Your Honor please.

The COURT: This deposition was taken where?

Mr. WHITLEY: At Scobey, Montana.

DEPOSITION OF GEORGE W. JOHNSON,  
witness on behalf of defendant, read to the jury, as  
follows:

My name is George W. Johnson. I am a policeman. [102] I am forty years of age. I was acquainted with Charles V. LaFavor when he resided at Scobey. I met him I think in 1917 and then after the war when I came back I was personally acquainted with him. The first I remember seeing him was—I returned in March and I saw him in May, in the early part of 1919. After that I was acquainted with him for a couple of years before he left and I even heard of him after he left. Mr. LaFavor was working during the spring and summer of 1919. He worked in the mill. I am familiar with the mill and know what they do,—carry sacks and load wagons. Some of the sacks weigh around a hundred pounds. I would say that this work required a great deal of physical exertion. He complained of it at different times. I do not know the approximate dates he worked there—it was during the summer of 1919. I could not say for how long—it was for a number of months, I believe. He worked at the electric light plant. I believe it was after he worked at the mill; it might have been before. I am familiar with the type of work he did,—fireman. The fireman shoveled coal into the furnace. They had three shifts—eight hours a shift. Shoveling coal is hard work. I know he was idle part of the time but I don't know what for. I think they paid a hundred or a hundred twenty-five at the light plant. I know they did later but I don't know if they did then. I

(Deposition of W. B. Heppner.)

have no knowledge as to the amount paid by the Smith-Tyner Mill.

Mr. WHITLEY: I would like to read the deposition of W. B. Heppner. [103]

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DEPOSITION OF W. B. HEPPNER,

witness on behalf of defendant, read to the jury, as follows:

My name is W. B. Heppner. I was acquainted with Charles V. LaFavor in 1919 and 1920. I just got acquainted with him in the spring of 1919. I saw him working at the flour mill. It must have been in July or the last of June, 1919. As far as I know he worked there about a year,—that would make it sometime in 1920. At the time I saw him, I was just there once, he was sacking flour. He was filling sacks with flour. He had a regular sack filler and the flour came through a chute into the sack. I did not observe whether or not it was necessary for him to handle the sacks of flour. I did not see that. That was the only time I saw him working. A friend of mine and I went down there. I did not know he was working at the mill but I met him there and he was working. Then, of course, I was working out of town and did not come in very often, and I did not see him until sometime next winter. Then I did not pay much attention whether he was working or not. I did not have any conversation with Mr. LaFavor relative to his work. I reside at Scobey. I am a

(Deposition of Paul Crum.)

carpenter. I am thirty-nine years of age.

Mr. WHITLEY: I would like to read the deposition of Paul Crum.

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#### DEPOSITION OF PAUL CRUM,

witness on behalf of defendant, read to the jury, as follows:

My name is Paul Crum. I reside at Scobey, Montana. I am a lawyer. I am forty-nine years of age. At the time Charles V. LaFavor resided at Scobey, I was acquainted with him. I knew him since the early summer of 1919 to the fall of 1920, or I might have known him prior to that time but I don't remember definitely. I was not associated with him [104] in any line of work. I was acquainted with the type of work that Mr. LaFavor was doing at that time. I know he worked as fireman in the Scobey Electric Light Plant in the summer of 1919 and that during part of 1919 and 1920 he worked in the shipping room of the Smith-Tyner Milling Company. I saw Mr. LaFavor working at the electric light plant during the summer of 1919. At that time he was firing and stoking the steam boiler in the Scobey light plant. He shoveled lignite coal into the furnace. The work which he was doing was the type of work that would be considered as manual labor, and required physical exertion. I do not know whether or not he worked continually during all that period of time. At the Smith-Tyner Milling Company he worked in the shipping room and handled



(Deposition of Paul Crum.)

sacks of flour and wheat and delivered to the customers. The sacks of flour weighed forty-eight and ninety-eight pounds, I believe. I do not know whether he worked continually all that entire time. I do not know whether he laid off from work any part of the time. I have not seen Mr. LaFavor since the latter part of 1920 at any time.

Mr. WHITLEY: The next is the deposition of L. C. McPherson.

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DEPOSITION OF L. C. McPHERSON,  
witness on behalf of defendant, read to the jury,  
as follows:

My name is L. C. McPherson. I reside at Post Falls, Idaho. I have lived there approximately two and one-half years. Previously I resided for two years at Greenacres, Washington, and nineteen years at Sagle, Idaho. I resided at Sagle, Idaho from 1906 to 1925. I am a farmer by occupation. I conducted a farm at Sagle, Idaho. I knew a man by the name of Charles V. LaFavor. I knew Mr. LaFavor at Sagle, Idaho, in about 1922. At that time he was placed by [105] the Veterans Bureau on my farm to learn what he could about keeping poultry. He worked for me in that capacity for approximately three months, from about February 1 to May 15, 1922. During the time he was employed at my farm I had occasion to observe him at his work. I worked

(Deposition of L. C. McPherson.)

with him. He was to help in the care and feeding of the poultry and also in the hatching of baby chicks. The manual labor consisted of carrying feed from the feed room to the several coops and cleaning the litter from the coops from time to time and cleaning out the droppings every morning. In the carrying of the food to the coops, approximately thirty to forty pounds were required to be carried,—that is of feed. He was required to carry that feed from fifty to one hundred and fifty feet. It was level ground until he came to the door of the poultry house. There was a six foot stairs to go up. When he first came for the first four or five weeks, he assisted me with the dairy work. That consisted of milking about six cows and carrying the milk to the separator room. Mr. LaFavor milked six cows. He carried the milk about three hundred feet to the separator room, in a large can. He took hold of one side of the can and I the other. This dairy work only continued for about four or five weeks. Spare time was given to helping in the incubator room. In the incubator room, I do not think he was required to do any lifting or carrying of articles, in the performance of his duties. His duties, as a whole, required a good deal of walking and remaining on his feet during the day. The hours he was required to keep with regard to going to work and quitting work were approximately twelve hours. That required his attention every day of the week. He was required to go to work about seven o'clock in [106] the morning

(Deposition of L. C. McPherson.)

and he quit between seven and eight in the evening. During the time he was employed in these various duties I had opportunity to observe his demeanor physically. During that period of time he complained of disability,—he complained of his lungs a good deal. He told me about being gassed in the war, in the service, and he attributed it to that condition. He performed his work and duties satisfactorily when in my employ. At the time he left his duties at my place he left at my request. It was not because his work was unsatisfactory. Mr. LaFavor was satisfactory when in my employ. And his leaving was not by reason of any physical disability in that capacity. For his work, Mr. LaFavor I believe was drawing regularly, monthly, from the government, one hundred and forty dollars. He was not paid anything in addition to that by myself. I do not remember that he limped or had a lameness in either of his legs. If he had been noticeably lame, I would have had opportunity to observe that. He appeared to have a cough or lung difficulty. I would say it was mild. In my observation of him, his coughing or his lung trouble did not interfere with the nature of his work. From my observations of him, his work was entirely satisfactory. During this period of employment from the first of February, 1922 until the fifteenth of May, Mr. LaFavor did not have occasion to be off his work because of sickness. Every second Saturday, under agreement, he had the privilege of going to Spokane to see his family. Dur-

(Deposition of L. C. McPherson.)

ing his employment, each second Sunday, he was not in full charge of the farm. As to the nature of Mr. LaFavor's recreation during his employment, he would go to his room and read a good deal. To my knowledge, he did not indulge in any recreations that [107] would take him out of doors. About thirty days after he came to my place he had medical attention,—by a government nurse. If I remember correctly it was to test his lungs and his general condition. I do not think it was done by a doctor.

Mr. WHITLEY: The deposition of Mrs. L. C. McPherson.

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DEPOSITION OF MRS. L. C. McPHERSON,  
witness on behalf of defendant, read to the jury, as follows:

My name is Mrs. L. C. McPherson. I was sworn yesterday. I am the wife of Mr. L. C. McPherson. I reside at Post Falls. I did reside at Sagle, Idaho, in 1922. I knew a man by the name of Charles LaFavor, at Sagle, Idaho. He was placed with us by the Veterans Bureau for the purpose of gaining what knowledge we could give him of the poultry business. I would say he was employed on our farm approximately early February and sometime in May, 1922. During that period of time I had occasion to observe Mr. LaFavor in his duties. He was required to help in the general care and feeding of the poultry and the general care of the incubators and chicks, baby chicks. He worked approximately about

(Deposition of Mrs. L. C. McPherson.)

twelve hours, but not continuously during that time, but that was the time it would take to take care of the poultry. At first I think he helped with the dairy work. The dairy work consisted of helping milk the cows and bringing the milk to the separator house. I had occasion to observe him in the manual labor of that work. I observed him help carry in the milk. He was required to carry that about three hundred feet. It would usually be a ten gallon can and whether that can was full or not, I could not say, and the ten gallon can weighs [108] eighty pounds. From casual appearance, I would say I did not observe any physical disability. I had occasion to observe him in his walking upon many occasions. He complained of his lungs. At times he seemed to have an appearance of being easily fatigued. I wouldn't say he had a very noticeable cough. He had little red marks or spots around his eyes. During his employment upon our farm he was not absent from his work because of sickness at any time. His employment was regular every day in the week. He was receiving compensation from the Veterans Bureau. He was not paid anything in addition to that by myself or Mr. McPherson. He was to help us for the knowledge we could give him in return. I know the reason of his leaving our employment. It was not by reason of his health. As far as I know his work was very satisfactory. As to his recreation habits after work hours,—I would say they consisted of resting and

(Deposition of Mrs. L. C. McPherson.)

reading about the house. To my knowledge he did not take part in any athletic games, fishing, hunting, or any of those recreations. During the time he was employed on our farm, I do not have any recollection of his having a doctor visit him for medical reasons. He was employed regularly every day of the week during his employment by us. He went to Spokane to see his family on Saturday every two weeks and returned on Monday. He walked to and from the station to Sagle, and then he took the train into Spokane. He was required to walk about three-quarters of a mile. He carried his suit case. He took these trips which required this three-quarter mile walk every two weeks, for the three months that he was employed.

Mr. WHITLEY: The deposition of Ella L. Olesen. [109]

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DEPOSITION OF ELLA L. OLESEN,  
witness on behalf of defendant, read to the jury,  
as follows:

My name is Ella L. Olesen. I reside in Moscow. I am the registrar of the University of Idaho. I have been in charge of the office of registrar since October 1, 1920. As registrar of the University of Idaho I am the custodian of the records of the University of Idaho that have to do with the attendance of the various students and the grades that they are given in the various subjects for which

(Deposition of Ella L. Olesen.)

they are registered. I have the summarized records of attendance of Charles V. LaFavor. The records that I have produced here pursuant to my subpoena and marked, for the purposes of identification, defendant's exhibits A, B, and C, are the only records of the University of Idaho with respect to the attendance and grades in the various subjects of Charles V. LaFavor,—the only records which have been sent to the registrar's office, and would be the only records kept by the University of Idaho with respect to his attendance and his grades. There are no other records other than those I have marked A, B, and C, for the purposes of identification, having to do with the attendance matriculation, absences and grades of Charles V. LaFavor. Exhibit A contains Mr. LaFavor's matriculation card showing that he was admitted to the University of Idaho as a special student on June 26, 1922; and the registration card for the 1922 summer session which shows that he was a rehabilitation student taking work in poultry and horticulture; and the class cards for these two subjects which show that he completed a course in horticulture on September 5, 1922 with a grade of B under Ernest Tolbert and that he completed poultry with a grade of A. [110] These are the official records with respect to the attendance and the courses taken and the grades obtained of which I am the custodian. (Defendant's exhibit A offered in evidence.) This (defendant's Exhibit B) is Mr. LaFavor's regis-

(Deposition of Ella L. Olesen.)

tration card for the first semester of 1922-23 showing that he was a rehabilitation student taking vocational courses in Poultry Husbandry, Horticulture and English and also that he was registered for Principles of Economics, a regular college subject; his transfer or attendance record for the first semester of 1922-23 showing that he received grades of A in Poultry Husbandry at the six and twelve week periods; and a grade of C at the six week period and B at the twelve week period in Horticulture. This card also shows his attendance record in Economics I and indicates that between September 26, 1922 and November 20, 1922, Mr. LaFavor had incurred fifteen absences. The course met three times per week. The grade cards which were filed at the end of the semester showing that he had a semester grade of B in Horticulture and an F in Economics. There are no class cards in Poultry and English. Covering the period from September 18, 1922 to January 30, 1923, inclusive, defendant's exhibit B, so marked for the purpose of identification, is the official record of the University of Idaho with respect to the attendance, grades and subjects taken by Charles V. LaFavor. (Defendant's exhibit B is offered in evidence.) Defendant's exhibit C, so marked for the purpose of identification, consists of Mr. LaFavor's registration card for the second semester of 1922-23 showing again that he was a rehabilitation student of the University of Idaho, and that he was



(Deposition of Ella L. Olesen.)

registered for courses in [111] Poultry Husbandry and Horticulture. Apparently he had added to his study list a course in Farm Water Systems and Sanitation on March 1, 1923; also the class cards for the three classes above mentioned. These show that Mr. LaFavor withdrew from the University before the end of the semester and received a mark of W as the withdrawal grade in all of his courses. Also the attendance record for the second semester of 1922-23 and the indefinite leave of absence which was made out for him on April 4, 1923, showing that he had withdrawn irregularly on March 21st. By irregular withdrawal we mean withdrawal from the University without the student filing a petition for indefinite leave of absence which he has received from his dean on his own initiative. Defendant's exhibit C is the official record of the University of Idaho showing the attendance, course of study taken, and grades given to Charles V. LaFavor during the period of February 5th to March 21, 1923. (Defendant's exhibit C is offered in evidence.) Defendant's exhibits A, B, and C are all the records of the University of Idaho with respect to the attendance, subjects taken and grades received by Charles V. LaFavor during the period from June 26, 1922 to March 21, 1923, inclusive. It would appear that Charles Victor LaFavor and Charles V. LaFavor are one and the same person. There are no other records of the University of Idaho with respect to the attendance and courses

(Deposition of Ella L. Olesen.)

taken and grades received by Charles V. LaFavor of which I am official custodian other than the official records I have produced here and which have been marked A, B and C for the purpose of identification. Charles V. LaFavor was a regularly enrolled student at the University [112] of Idaho,—as a vocational rehabilitation student. I have attendance records of Charles V. LaFavor or Charles Victor LaFavor in only those subjects taught by University of Idaho instructors which offer college credit. For the period from February 5, 1923 to March 21, 1923 I have the attendance record for the subject of horticulture, as appearing in defendant's exhibit C. During the period from September 18, 1922 to February 4, 1923, I have the transfer card which I mentioned before which shows absences in Economics I, and which is defendant's exhibit B. During the first period that Charles V. LaFavor was in attendance at the University of Idaho, being that period covered by defendant's exhibit A, no attendance record was kept for any subject. The grade A is interpreted as having a numerical equivalent of 90-100, B 80-89, C 70-79, D 60-69, E 50-59 and F below 50, under the scale then used at the University of Idaho. I should say the grade of B indicates about 86-89 as to numerical standing. A is the highest grade given at the University of Idaho. From defendant's exhibits A, B and C, I should say that Charles V. LaFavor was in attendance as a vocational student at the Uni-

(Deposition of Ella L. Olesen.)

University of Idaho from June 26, 1922 to March 21, 1923.

Whereupon defendant's exhibit A-15, after being identified, was admitted in evidence, without objection.

Whereupon defendant's exhibit A-16, after being identified, was admitted in evidence, without objection.

Whereupon defendant's exhibit A-17, after being identified, was admitted in evidence, without objection.

Whereupon defendant's exhibit A-18, after being identified, was admitted in evidence, without objection. [113]

Whereupon defendant's exhibits A-19, A-20, A-21, A-22, A-23, A-24 and A-25, after being identified, were admitted in evidence, without objection.

(Defendant's exhibit A-19, A-20, A-22, A-23, A-24 and A-25 read to the jury by Mr. Whitley.)

Mr. McCUTCHEON: We will stipulate that all of these may be admitted. The plaintiff will ask that they be held so that we can offer them in rebuttal.

The COURT: Any objection.

Mr. WHITLEY: No objection.

TESTIMONY OF GEORGE E. PFEIFFER,  
for Defendant.

GEORGE E. PFEIFFER, after being first duly sworn on oath, testified as follows on behalf of the defendant, on

Direct Examination.

By Mr. DeWOLFE:

My name is George E. Pfeiffer. I am a physician and surgeon. I received my medical training at the Chicago Medical School, 1910. I received a degree of M. D. in 1910. I am now employed by the United States Veterans Administration, Portland, Oregon. I am a specialist in general surgery and have practiced general surgery for the last fourteen or fifteen years. I am a Fellow of the American College of Surgeons, a member of the Medical Societe, and Chief of the Surgical Service of the United States Veterans Hospital at Portland, Oregon. I am now located at Portland, Oregon. I am Chief of the Surgical Service. Surgery is my specialty. I examined Charles V. LaFavor, generally speaking, about twice a year, beginning in December 1925, going on through, I believe, it was March, in the spring of 1926; the winter of 1926; along about the spring of 1927; and [114] there may be one or two more, I am not sure. The first clinical examination, that is the examination of the patient, was in December 1925. I had x-rays before that. I made a reading of the x-rays in March of that year. I presume those plates were destroyed as having been too old, as having passed the storage limit for x-ray films in the

(Testimony of George E. Pfeiffer.)

United States Veterans Bureau. I believe the storage limit is two years. They were x-rays taken of the spine and pelvis. They were negative for any pathology.

George E. Pfeiffer testified as follows on

Cross Examination.

By Mr. NEWMAN:

I did not personally take these x-ray pictures. I don't think I was present when they were taken. It is customary in the hospital of that type, for technicians to actually take the x-rays; during the time they are taking them, they identify the films by certain numbers. The doctors who interpret those films depend on the proper placing of the numbers and proper keeping of the record for the identification of the particular films, he is reading; in other words, he depends on the technician's integrity and ability to properly record the thing, or that film,—the particular one relating to that particular patient. That is the only way we have of identifying the film with the patient.

George E. Pfeiffer testified as follows on

Redirect Examination.

By Mr. WOLFE:

That picture was taken at the United States Veterans Hospital, Tacoma, Washington, in 1925. [115]

(Testimony of George E. Pfeiffer.)

George E. Pfeiffer testified as follows on

Cross Examination (contd)

By Mr. NEWMAN:

I do not know of my personal knowledge that that was the picture of Charles LaFavor except that it had the number stamped on it,—it was the number given of that patient when the picture was taken. I was able to tell from the picture in what position the patient was placed when these pictures were taken.

George E. Pfeiffer testified as follows on

Direct Examination (contd)

By Mr. DeWOLFE:

There was nothing in the x-rays to indicate diseased changes of the bones in the particular parts x-rayed, the spine, right shoulder and hips. As I recall it, the parts x-rayed were the spine, right shoulder and hips. I examined him personally in December 1925. I examined him again in 1926, March 1926. I examined him in 1927, twice I think in 1927. He complained generally,—pain in the back, pain on motion, aching in the back, pain in the shoulders and hips, especially during movement. I diagnosed my finding on the examination of December 1925 as early hypertrophic arthritis. In other words, rheumatism, in which bone changes were occurring, new bone was being deposited—lime and salts were being deposited in the ligaments around the bone. There was nothing in the findings

(Testimony of George E. Pfeiffer.)

at the time I examined him that would enable me to say he could not work. I interpreted that x-ray in March of 1925. In my examination in December 1925, I found there were changes indicating the man had a productive arthritis, which I did not find in the x-ray in March 1925. The x-ray changes [116] came into existence since March 1925. The x-ray changes, however, are usually preceded by clinical changes; the x-rays can only show changes in shadows; those changes usually occur somewhat later than the onset of the disease, perhaps a year or so, or over a year. I think my next examination took place in March 1926. At that time I again found the man was suffering from moderately early hypertrophic arthritis, somewhat worse than the condition found in December. By moderately I mean the x-ray findings suggested that the condition was not more than,—I will say, arbitrarily, a year or two old. The striking feature of the examination made, in my opinion, was the progression noted from time to time; I saw this man from December 1925 through the next few years. The next examination was either in December 1926 or the following spring, I am not sure. At that time my findings showed the man was decidedly worse; his rheumatism was getting worse. I characterized it as progressive arthritis. The patient had several focal infections, as we term them, infections involving the teeth, tonsils and the prostate gland, which warranted an opinion that his rheumatism had resulted from such foci of infection.

(Testimony of George E. Pfeiffer.)

There was no evidence of trauma or injury at the time I examined him.

George E. Pfeiffer testified as follows on

Cross Examination (cont'd)

By Mr. NEWMAN:

By productive arthritis I mean arthritis characterized by the production of new bone, deposition of calcium salts in the ligaments around the bones. The first time I examined this patient was in 1925. In my opinion [117] this productive arthritis had existed not over a year or two, then; that is, so far as the productive changes were concerned; in fact, there was no evidence of productive changes in March of 1925. I think the x-rays of December, 1925 showed symptoms of changes; December, I think, not in March. Once these bones became infected so that the symptoms are shown on the x-ray, the man could not recover so that in future years these symptoms would not show on the x-ray. The x-ray would continue to show signs of arthritis; he would recover clinically. Changes characteristic of the disease are shown in the x-rays through the years, later on. The changes are there; they don't disappear; the deposition of salts in the ligaments, productive changes in the bones are permanent, naturally, unless removed surgically. If there had been symptoms shown by x-rays years before, it should have shown in 1925. I made a special examination, an examination confined chiefly to the orthopedic condition complained of;



(Testimony of George E. Pfeiffer.)

however, in making such examination, it is customary to survey the patient generally; he complained of so many things that it was quite obvious he was of an unstable makeup; in other words, it was difficult to correctly evaluate his complaints, made it difficult to decide as to how much weight to attach to some of his complaints with reference to his orthopedic disability. I did not examine his heart and lungs. I just made a general survey, sized him up as he walked and went through the various exercises he was requested to go through. Nature has nothing to do with that,—arthritis of the lumbar, of the sacroiliac, that is, providing a way of compensation by taking the weight of the side affected and causing a curvature of the spine. If he has pain, that side tilts to the other [118] side. The patient relieves the weight on the affected side; he tilts the pelvis upward on that side and in that way produces some curvature of the spine which is of a temporary character, however. As to the length of time it takes to develop that curvature, just the moment the patient relieves his weight on that side, elevates the spine—At that time I did not find any curvature of the spine in the x-ray. It would depend entirely upon the way the patient placed himself on the side,—if he drew up one side of the pelvis, he could produce a curve in the spine. In my examination of the patient I took into consideration his past history. As I recall it, I am not sure of the details, the history he gave me was essentially the history I heard given here yesterday, as having been gassed in the service

(Testimony of George E. Pfeiffer.)

and having been shellshocked or things of that sort and the history of the gradual onset of the pain in his back and inability to use his hips and shoulders as well as he wanted to; the history of sore throat. I think he had a history of having been told he had scarlet fever. He gave a history of sore throat; I am not sure whether he knew it was diphtheria or not. He gave a history of having been told he had had pleurisy. He said he inhaled gas. I do not recall that he gave a history of being knocked out by a high explosive shell; he said shellshocked, something of that sort. He said he had pyorrhea. I don't recall having given me a history of having had flu. As to his giving me his hospital record while in the service, no such facts as that are contained in the clinical records in the hospital in which the patient was at that time, which records were submitted to me at the time of my examination. [119] All those things are taken into consideration, that is in diagnosing the condition of the patient. Scarlet fever, diphtheria, are infectious diseases; there is some question so far as flu is concerned in so far as no one seems to know what causes it. An arthritis occurring in 1925 has nothing to do with infectious diseases occurring ten or twelve years prior.

Q. If it were possible that the record showed that arthritis existed a few months after his discharge from the service—?

Mr. WHITLEY: (Interrupting) We object to that.

(Testimony of George E. Pfeiffer.)

The COURT: Objection overruled.

Q. Isn't it probable that that would have been caused by one of these infectious diseases?

Mr. DeWOLFE: For the purpose of the record, we object on the ground it is without foundation.

The COURT: Overruled.

Mr. DeWOLFE: Exception.

The COURT: Allowed.

I should have to say that an arthritis existing a few months after his discharge from the service might be based upon any one or all of such infectious diseases. However, it is a rather general statement. You named three or four diseases, which might have produced an arthritis. That is rather far fetched to say any one of those infectious diseases might have caused hypertrophic arthritis. It would be very, very difficult to prove medically. One of the recognized causes of hypertrophic arthritis is foci of infection. Focus infection is entirely different from the infectious diseases of the type you are discussing; focus infection means simply there is an area of infection [120] somewhere in the body, commonly likened to tonsilitis, pyorrhea, prostatitis, infected gall bladder; an infectious disease, such as you were discussing is a disease, characterized by a more or less short course and complete recovery.

(Testimony of George E. Pfeiffer.)

George E. Pfeiffer testified as follows on

Redirect Examination

By Mr. DeWOLFE:

There are two types of curvature commonly recognized. One is a functional type in which the curvature is not dependent upon bone or ligament changes; merely dependent on the ability of the spine to bend. The mere fact a photograph was taken at the time it was bent, would not mean he could not straighten his spine. The second type depends on actual changes in the spine, such type of curvature does not change. The type seen in the hunchback for instance, who has a type of curvature that does not change, except by surgical operation or something of that sort.

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TESTIMONY OF B. A. SEIBERT,  
for Defendant.

B. A. SEIBERT, after being first duly sworn on oath, testified as follows on behalf of the defendant, on

Direct Examination

By Mr. DeWOLFE:

My name is B. A. Seibert. I am a physician. I was formerly with the Veterans Administration. I am now on furlough. I am a graduate of Barnes University, 1909, from which I obtained the degree

(Testimony of B. A. Seibert.)

of doctor of medicine. I am licensed to practice medicine in the State of Washington. I have been engaged in the practice of medicine since my graduation. I was with the Veterans Administration in [121] 1925. I examined Charles LaFavor. The first time I examined him was in December, 1925, and then again in August, 1927. His complaints to me were pain in the left leg and hip and left arm between the shoulder blades and headache and some stomach complaint, gas on the stomach; I think that was his complaint in 1925. In 1927 his complaints were of the same general character except at that time, he complained of pain in the back. The first examination, he was referred to me for a special examination of the spine and the second examination was a general examination. In 1927 I did not find any heart disability. In 1927 because of his complaint of pain in the lung on the left side, I referred him to a lung specialist, Dr. Feaman, I think. In 1925 in my examination I made a diagnosis of arthritis of the sacro-iliac. That is the joint where the sacrum articulates with the ilium or pelvic bone, the sacrum being the lower segment of the spinal column. Arthritis is any inflammation of the articular surface involving the synovial membrane or bone. At that time, in my opinion, that condition was of short duration. There were no clinical findings to verify the diagnosis, made on x-ray findings. By short duration, I mean probably a year or year and a half. In my opinion, from the condition I found

(Testimony of B. A. Seibert.)

at that time, he could work,—do work of a general character. In my opinion he could do farm work at that time. In 1927 I found the same condition except there had been a progression of this arthritic condition at that time. There was some involvement of the dorsal spine. I would not be able to say whether or not in 1925 that condition came from an injury, whether it was traumatic or due to infection. It is the present day opinion that most of these arthritises are from a focus of in- [122] fection, or direct invasion of the bacteria of a joint.

B. A. Seibert testified as follows on

#### Cross Examination

By Mr. NEWMAN:

I examined his heart in 1927. Not by x-ray, just a clinical examination. At that time he complained about soreness in the left arm, left side; pain in the lungs and left chest. It may be symptoms of heart trouble; I wouldn't say that it is exactly. In true angina pectoris there is a pain referred down the arm at times. Pain in the right arm and right chest is a marked symptom of angina pectoris. I found no heart trouble. I am not familiar with "Krummer" on heart diseases.

TESTIMONY OF  
CONSTANCE M. MIKKELSEN  
for Defendant.

CONSTANCE M. MIKKELSEN, after being first duly sworn on oath, testified as follows on behalf of the defendant, on

Direct Examination

By Mr. WHITLEY:

My name is Constance M. Mikkelsen. I reside at Seattle, Washington. I am Assistant State Registrar. As Assistant State Registrar, I have access and custody of the records of the Washington State Board of Health. This is the original death certificate of Charles LaFavor (referring to defendant's exhibit A-26).

Constance M. Mikkelsen testified as follows on

Cross Examination

By Mr. McCUTCHEON:

I work for the State Board of Health. I am the keeper of these records. They are made out on the date they show. The certificate was filed with the local registrar, [123] January 13, 1932. I don't know when it was made out; there is no date on there. Only the date when filed; that, by law, has to be 72 hours after death, within 72 hours.

TESTIMONY OF EDWARD PERRY,  
for Defendant.

EDWARD PERRY, after being first duly sworn on oath, testified as follows on behalf of the defendant, on

Direct Examination.

By Mr. WHITLEY:

My name is Edward Perry. I am a physician. I am the Coroner. I was the Pierce County Coroner on January 11, 1932. (Defendant's exhibit A-26 handed to witness) That is my signature. That is the original of a death certificate of Charles LaFavor, signed by me with the cause of death, et cetera. It was sent in to the local Health Registrar. At the time of the death of Charles LaFavor I made an external examination, no autopsy, in my official capacity as coroner, I examined the body, on the day of his death, January 11th, at the mortuary. There were no incisions or scars on the body at the time of the examination.

Edward Perry testified as follows on

Cross Examination.

By Mr. NEWMAN:

I examined the body of Charles LaFavor on January 11th, the day he died. I did not see the body afterwards. I saw the body only one time, January 11th, the day he died; I don't remember the time of day.

Mr. WHITLEY: Reads to the jury from the service records. [124]



TESTIMONY OF ALBERT C. FEAMAN,  
for Defendant.

ALBERT C. FEAMAN, after being first duly sworn on oath, testified as follows on behalf of the defendant, on

Direct Examination.

By Mr. WHITLEY :

My name is Albert C. Feaman. I reside at Seattle, Washington. I am a physician and surgeon. I am employed by the United States Veterans Administration, Seattle, Washington. I am a graduate of the University of Minnesota, 1919. I am admitted to practice medicine in the State of Washington. I specialize in diseases of the heart and lungs. I have made that my specialty since 1919. I was resident physician at the Seattle Municipal Hospital, Tuberculosis and Contagious Hospital, for three years; following that, I was in charge of the heart and lung work at the sub-district office, Portland; was then sent to Boise, Idaho for three months,—opened the office there. I then returned to Seattle and was in charge of District 13 from 1923 to 1926,—composed of Oregon, Washington, Idaho, Montana and Alaska. Since that time, I have done the heart and lung work in the Seattle Regional Office. I took a post graduate course in 1925 and one at Oteen in September 1925. I examined Mr. LaFavor during his lifetime. The first examination was December 15, 1925. That was in connection with the lung examination only. At that time, he complained of distress and pain. He had an old pleuretic thickening of the left lung, I called it. At that time I made a special lung

(Testimony of Albert C. Feaman.)

examination. I examined him again on October 19, 1931,—a heart and lung examination. At that time he complained about this pain and distress in the left lower lung and he complained about dizziness, shortness of [125] breath on exertion, but no precordia pain, and pains in the vicinity of the old pleurisy. By precordia pain I mean a pain over the heart. He made no complaint of precordia pain at that time. On that examination I still found the same evidence of chronic fibrous pleurisy, adhesions of the diaphragm and lungs, retraction of the chest. The heart examination showed no evidence of any heart trouble at that time, by reason of the blood pressure, absence of thrills or murmurs or things we characterize as due to heart disease. Angina pectoris is a manifestation of pain as the result of several conditions. The most common one is a hardening of the coronary artery, the artery which supplies blood to the heart,—hardening of the aorta,—that is calcified deposits in the aorta or aorta valves or a myocarditis; that is, a chronic condition of the heart muscles; those are the most common factors. As to the different types of angina pectoris, there is the true type called the major type, angina pectoris true; there is an incipient type, milder form of the true angina pectoris; there is an emotional type, which is the emotional type resulting in spasms of the arteries, usually of the coronary or it might be general throughout the body. The usual causes of angina are isolated hardening of the coronary, which is a rare thing, or a hardening of the aorta, or both,

(Testimony of Albert C. Feaman.)

or a myocarditis. As to the symptoms of angina pectoris, the first thing that the patient complains of is a vicelike oppression over the chest, usually the upper portion, while it may be the lower portion, usually confined to the sternum, where it first approaches. This pain comes on while the patient is exerting himself, walking against the wind, up [126] stairs or running or in emotional anger. This pain radiates either to the neck or left arm, or both arms, or occasionally, it may appear in the groin or scrotum, but the main thing is, the patient stops immediately on having an attack, holds his breath, fearful of impending death. He presents a ghostlike, masklike appearance. He stands still, afraid to move, think; afraid to do anything that might bring a greater intensification of this pain. There are five different methods of termination of those attacks. The first is, he may suddenly die—the onset comes; he dies immediately following the attack—death of exhaustion and fear—dies from the shock and reaction of the attack. He may recover or fall in a faint; the other is that the attack may last for a little while, he will get over it and have exhaustion and in two or three days, the whole thing disappears; the last is, he may completely recover and may never have another attack again. I was present in the courtroom and heard the history of Charles LaFavor and heard the complaints as they were read. I believe I enumerated the symptoms that occur in angina pectoris,—that the result is a spasm causing pain to travel over those nerve trunks, from the

(Testimony of Albert C. Feaman.)

third cervical to the first dorsal and the course through which that follows in the neck and down the arm,—so that the symptomatology is not characteristic of a true angina pectoris—by complaining of pains in the left arm, alone,—it first has to have its origin in the heart, where the spasm takes place and radiates into the arm.

Q. Doctor, from the results of the examinations and complaints made by Mr. LaFavor, tracing it from the time he went into the service in 1917, until your last examination of him in October 1931, what in your opinion would [127] be the probable causative factor of the production of the angina pectoris, if he did have angina pectoris, as the cause of his death?

A. Because of the fact this condition of angina pectoris is associated with the deposit of calcium in the blood vessels, such as we call hardening of the arteries and in view of the fact that angina pectoris is given as the cause of the death and we knew that it is associated with the hardening of the arteries. In arthritis we note calcium is deposited along the joint surfaces—in long standing arthritis, as it develops, there is a deposition of the calcium in and around the blood vessel walls—to account for the history showing progressive arthritis, I would associate it with the calcium deposits—in the joint spaces causes his hypertrophic arthritis.

I never heard of a situation where an injury, trauma, in 1918 or 1919 caused an attack of an-

(Testimony of Albert C. Feaman.)

gina pectoris in January 1932. In my examination of the heart made in October 1931, I did not find any evidence of angina pectoris. The blood pressure was within normal limits. The pulse was normal, heart size normal, no evidence of myocardial changes, arthritis, showed no evidence of sclerosis. There was no outward or inward manifestation of a condition that could be associated with angina. In every heart examination there are a series of questions which we ask the patient in order to get certain information—if they have precordia pain, palpitation, cough and edema—those questions are asked every patient. This precordia pain was not given as a symptom by Mr. LaFavor at that time. He did complain of shortness of breath. The precordial pain is the outstanding pain which causes one to have fear of death. You have [128] to have that spasm of the coronary artery to have angina because the spasm is due to the blood to the heart being impeded and this pain is the outstanding thing. You have to have it before you have a true angina. At the time I examined him there was nothing to show he had had such a pain.

Albert C. Feaman testified as follows on

*Direct Examination.*

By Mr. NEWMAN:

He did not give me such a history. That is always underlined in every examination. When a man says he has precordial pain that is an outstanding characteristic and if he had, it would have

(Testimony of Albert C. Feaman.)

been recorded. He gave me a history of pain in the left chest. I do not recall that he gave me a history of pain in the left arm. He complained of giddiness, shortness of breath and I think my examination will show you that. In 1925 I made a lung examination; in 1931 I made the heart examination. Pain in the left arm and left chest is not one of the most common symptoms of angina pectoris. I have tried to show where and why the pain had to be localized in the area with the segments associated with it. I said the cause of the pain was spasm of the heart muscle and artery that supplies the heart with blood. Therefore, the pain must of necessity emanate from the source where it starts, and it follows the course down the arm to the wrist. The sternum is the breastbone here (indicating). The pain in angina pectoris does not radiate across the chest,—it goes up, following the course of the nerve. It has to follow the course of the nerve trunks. That would radiate and connect up with the brachial plexus— [129] goes up the neck to the shoulder and down the arm. This vicelike pain is the most common symptom of angina pectoris. I am not familiar with Krummer on Heart Diseases. I know that author's work. Part of the function of making the examination is to determine whether the person's heart was displaced from its natural position. From my examination I did not find displacement of the heart. I percussed the heart and I had X-rays on the

(Testimony of Albert C. Feaman.)

heart to confirm that. If a year or two prior to my examination the heart had been displaced on account of a pleurisy condition, that would have to exist at the time of my examination, if it were due as the result of pleurisy—change of posture—the heart hangs suspended. We can change our heart position by our position—pleural adhesions, fixed in one position. If it had been displaced by pleurisy adhesions prior to my examination, it would have shown in my examination. If that displacement was found by doctors prior to my examination and not by me, somebody was mistaken in their diagnosis, either myself or the other doctors. I don't recall having prescribed for his heart. I did not give him some powders for his heart—I do not give powders for the heart. Arthritis is one of the common causes of heart disease. By that I mean produces a change in the lining membrane of the inside of the heart. Those changes cause a leak of the valve that produces enlargement of the heart, produces murmurs and other changes in the blood pressure, very easily discernible. If the arthritis at that period back in 1918 was responsible for the heart disease, there would have been the manifestations of swelling of the ankles, shortness of breath, enlargement of the heart, leaking valves or something—subjective or objective symptoms. If you find [130] a condition of that kind, certainly he will complain of something, show some evidence, like the swelling of the ankles or blueness of the lips,—

(Testimony of Albert C. Feaman.)

those are the manifestations upon which we classify the beginning of a heart disease. In 1931 he complained of shortness of breath, which is a remote symptom. Syspnea in itself is not indicative; any person may walk up the stairs and be short of breath without having heart disease. The last examination by me was in 1931. I did not have an opportunity to perform an autopsy on the body. I did not know he was dead until I was called to the trial here.

Albert C. Feaman testified as follows on

Redirect Examination

By Mr. WHITLEY:

I did not find an abnormal condition of the heart in my examination of October, 1931.

Whereupon the defendant rested its case.

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Whereupon plaintiffs' exhibit #26, after being identified, was offered and admitted in evidence without objection.

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Whereupon the defendant made the following motion at the close of all the testimony.

Mr. DeWOLFE: Your Honor, for the purpose of the record, we move for an instructed verdict on behalf of the defendant on the same grounds and for



the same reasons interposed at the end of the plaintiffs' case.

Which motion was denied and exception noted on behalf of the defendant.

Whereupon counsel for the respective parties argued the case to the jury. [131]

Whereupon the Court gave the following instructions to the jury:

The COURT: The Court will instruct you concerning the law and when you retire to the jury room you will consider the evidence given you in the case and instructions given you by the Court, to decide upon the verdict, you should return—two plaintiffs sue the United States to recover on an insurance policy. One is the administratrix, who has appeared before you; the other is the beneficiary named in the policy.

It may not be necessary, but it might save discussion in the jury room if the Court explained to you why that was,—why the two plaintiffs are here. It may have been made plain to you by the attorneys the insured sued on this policy in his lifetime,—anything recoverable under this policy, because of his death would go to the beneficiary, the mother; any payments that had already matured, that he was suing to recover, which had already matured up to the date of his death, should go to his administratrix. Therefore, there are two plaintiffs.

The plaintiffs allege the enlistment of the insured, Charles V. LaFavor; that he took out \$10,000.00 of insurance, the condition of which was that if he

became totally and permanently disabled during the existence of that insurance, that the Government would pay so much a month for such total and permanent disability, or in case of his death, pay \$10,000.00; that he was discharged and at the time of discharge had become totally and permanently disabled.

The defendant answers does not deny his enlistment, admits the insurance but denies that at the time of his [132] discharge, March 21, 1919, he had become totally and permanently disabled and then alleges affirmatively, as an affirmative defense, that because of the failure to pay the premium becoming due April 1, 1919, this policy of insurance lapsed.

The plaintiff replies, denying that the policy had lapsed. The effect of that is that there is no dispute, that no premium was made after that deduction from his pay for March, 1919; another payment would become due the 1st of April, 1919, and that was not paid. Well, the denial by the plaintiffs in their reply that the policy lapsed, means not that there was a payment the first of April but that he had become totally and permanently disabled before midnight of the 30th of April, 1919.

The burden rests upon the plaintiffs of showing that he, on the 30th of April, 1919, at midnight, was totally and permanently disabled. The burden rests upon the plaintiffs of *having* that he was totally disabled from that time up to the time of his death; the further burden rests upon the plaintiffs of showing that on the 30th of April, 1919, at midnight, his

condition was such as to render it reasonably certain that he would be totally disabled throughout the remainder of his life.

The regulations which have the effect of law, define total disability, which is permanent, within the meaning of this law and this policy. Total disability as has been repeatedly stated to you in the course of the trial—is any impairment of mind or body that makes it impossible for the disabled person to continuously follow a substantially gainful occupation; that it shall be deemed permanent when it is founded upon conditions that make it reasonably certain [133] that such total disability will continue throughout the remainder of the disabled person's life.

Coming back, going over this definition again, in order to explain certain words used, the definition is that total disability is any impairment of mind or body, that makes it impossible for the disabled person to continuously follow any substantially gainful occupation—not necessarily the occupation which the disabled person the insured followed at the time of his enlistment, or any of the occupations he may have followed prior to his enlistment. The language of the definition is “unable to continuously follow any substantially gainful occupation”.

Now, if an insured person became disabled in a way that prevented him from following his pre-war occupation, or occupations, he might be totally disabled temporarily, but if he was able, by study, application and practice, to fit himself for some other

substantially gainful occupation, so he could follow it continuously—while he might be totally disabled for the time being, he would not be totally, permanently disabled.

Repeating the definition, in order to call your attention to other words that need explanation—the definition reads “Total disability is any impairment of mind or body that makes it impossible for the disabled person to continuously follow any substantially gainful occupation”. It is not necessary that one be able to follow an occupation without any interruption whatever, in order to come within the term “continuously”—the use of the word “continuously” as it here occurs, has a relative meaning.

You will understand it just as you would when used in ordinary speech, of someone being continuously employed. [134] The mere fact that one might be occasionally incapacitated from following an occupation—slight *a* temporary ailments, would not deprive—would not mean he was not able to continuously follow his occupation. Neither would the fact that a man did do some work once in a while, for which he was paid, mean that he was able to continuously be employed. If the one insured, continuously follows a substantially gainful occupation but only does so by injuring his health or jeopardizing his health, in a way that it hurts one, taking ordinary care of his health would not do, such a person cannot be said, within this law and policy of insurance, to be able to continuously follow a substantially gainful occupation.

The burden rests upon the plaintiffs of showing by a fair preponderance of the evidence that upon April 30, 1919, at midnight, the insured was totally disabled; the burden rests upon the plaintiffs of showing by a fair preponderance of the evidence that from that time to the time of his death, he was totally disabled; but, there is a greater degree of certainty required than a mere preponderance of the evidence regarding his future condition, on the 30th of April, at midnight; the burden rests upon the plaintiffs of showing that at that time, his condition was such as to render it reasonably certain that he would be totally disabled for the remainder of his life.

A preponderance of the evidence is the greater weight of evidence; that evidence preponderates which makes such an appeal to your reason, experience, and intelligence as to create and induce a belief in your minds. Where there is a dispute arising under the evidence, that evidence preponderates which is strong enough to create and induce [135] belief in your minds, in spite of the opposing evidence—or assaults made upon it by way of argument.

The pleadings which you will take to your jury room with you, where these issues are outlined, consist of the plaintiffs' third amended complaint; the answer of the defendant which is headed "Answer to the Second Amended Complaint" but you will not be misled by that fact because it was stipulated in the case that the answer to the Second Amended Complaint might stand as the Answer to the Third Amended Complaint.

The Court, in the course of the trial, was, as the Court understood it, at least, impliedly asked to instruct you in regard to admitted handwriting. The plaintiff, Mrs. LaFavor, while testifying, admitted certain handwriting to be that of Mr. LaFavor and did not admit (while I don't recall that she denied it), other handwriting.

Well, you have a right, if there is any question in your minds regarding it, you have a right to compare the admitted handwriting with that handwriting which may not have been admitted to be that of Mr. LaFavor, and if you can do so, determine from that comparison whether the questioned handwriting is his or not.

There were objections made by the attorneys at times concerning the statements of the attorneys—your oath was to try this case on the evidence, that means the testimony, it means what the witnesses tell you, after they have been sworn and sit before you and give their testimony; of course, the depositions in this case, they are included in the testimony—but if any of the attorneys on either side have made any statements at any time, whether they were made in an opening statement or whether they were made in the course of [136] the trial, that is not supported by your recollection of the evidence, you will wholly disregard any such statement.

You are, in this case, as in every case where questions of fact are tried to a jury, the sole and exclusive judges of every question of fact, in this case the weight of the evidence and credibility of the witnesses. The Court will not enlarge upon that instruction except in one particular. You have been re-

peatedly instructed at length as to what you might and should take into account in discharging those functions; one of the rules is that you will take into account whether the testimony of the witness has been corroborated where you would expect it to be corroborated, if it were true.

The defense attorneys in their argument to you invoked that rule regarding the testimony of Dr. Steele, who had testified concerning an autopsy, arguing that if his statement in that respect was true, that some other doctor would have been called to corroborate it. The plaintiffs' contention in that respect was that there wasn't any real dispute and it did not require corroboration.

The Court will, again, repeat the rule in that respect. That is, you will take into account whether the testimony has been corroborated where you consider you have the right to expect it to have been corroborated if it were true.

You will not discredit any testimony given if you feel it did not need corroboration and you had no right to expect corroboration.

The form of verdict in this case you may not be familiar with. If you find under the evidence and instructions for the defendant, the form of verdict in that case, [137] simply reads as follows: "We, the jury in the above entitled case, find for the defendant" and all that it will require is the signature of the foreman.

However, if you find for the plaintiffs, the verdict is a little more complicated. It reads as follows: "We the jury empaneled in the above entitled cause,

find for the plaintiffs and further find Charles LaFavor became totally and permanently disabled——” then occur two words, one above the other; the word “on” and the word “before”—then reading on the blank day of the blank year—now, if *you able* to agree, if you find for the plaintiffs and are able to agree on the exact date when he became totally and permanently disabled, you would scratch out the word “before” and it will read “totally and permanently disabled on the blank day of blank”—fill in the blank. If you are unable to agree on the exact date but are able to agree he became permanently and totally disabled before a certain date, you will scratch out the word “on” and leave the word “before”. Probably after you look at this, it will be perfectly clear to you. Anything further, gentlemen?

COUNSEL: Nothing further, your Honor.

And now, in furtherance of justice and that right and justice may be done the defendant, it prays that this, its bill of exceptions, may be settled, allowed, signed, sealed by the Court and made a part of the record.

ANTHONY SAVAGE,  
United States Attorney.  
TOM DeWOLFE,  
Asst. United States Attorney.

Service acknowledged by receipt of copy this Jan. 15, 1934.

A. W. NEWMAN,  
JOHN T. McCUTCHEON,  
Attys for Plaintiffs.

[Endorsed]: Lodged Jan. 15, 1934. [138]



[Title of Court and Cause.]

ORDER SETTLING BILL OF EXCEPTIONS.

The above case coming on for hearing on application of the defendant for the settlement and certification of its proposed bill of exceptions and the parties agreeing that the proposed bill contains all of the material facts occurring upon the trial of the cause and all of the material evidence adduced during the trial, together with exceptions thereto and all material matters and things occurring upon the trial except the exhibits introduced in evidence, and the Court being so and not otherwise advised, save as to the instructions given at the close of the trial, which have been by me examined and corrected,

IT IS ORDERED that the foregoing, consisting of 108 pages, with the exception of lines 14 to 30, inclusive, page 53; lines 1 to 5, 10 to 14 and 19 to 31, page 54; lines 1 to 31, inclusive, page 55; lines 1 to 3, 7 to 30, page 56 and lines 1 to 11, inclusive, page 57, is settled and hereby certified by the undersigned judge presiding at the trial of said cause as a full and true bill of exceptions in said cause and as containing all of the material facts, matters, things and exceptions thereto, occurring upon the trial of said cause and evidence adduced during the trial, except the exhibits and the return and receipt of the verdict, and the Clerk is ordered to file the same and to transmit it to the Clerk of the Circuit Court of Appeals as a part of the record on appeal herein.

[139]

IT IS FURTHER ORDERED That the Clerk attach to the bill, over his certificate, all of the ex-

hibits admitted in the trial of the cause, which are numbered and lettered as follows:

Plaintiff's exhibits:

1, 2, 3, 4, 5, 6, 7, 9, 10, 11, 12, 13, 14, 17, 18, 19, 20, 21, 24, 26.

Defendant's exhibits:

A-1, A-2, A-3, A-4, A-5, A-6, A-7, A-8, A-9, A-10, A-12, A-13, A-15, A-16, A-17, A-18, A-19, A-20, A-21, A-22, A-23, A-24 and A-25.

Done at Tacoma, Washington, this 17th day of February, 1934.

EDWARD E. CUSHMAN,  
United States District Judge.

[Endorsed]: Filed Febr. 17, 1934. [140]

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[Title of Court and Cause.]

PETITION FOR APPEAL.

The above named defendant, feeling itself aggrieved by the order, judgment and decree made and entered in this cause on October 17, 1933, does hereby appeal from the said order, judgment and decree in each and every part thereof to the Circuit Court of Appeals for the Ninth Circuit for the reasons specified in the Assignment of Errors herein, and said defendant prays that its appeal be allowed and citation be issued as provided by law, and that a transcript of the record, proceedings and papers upon which said order, judgment and decree was based, duly authenticated, be sent to the United States Circuit Court of Appeals for the Ninth Cir-

cuit, as by the rules of said court in such cases made and provided.

ANTHONY SAVAGE,  
United States Attorney.  
TOM DeWOLFE,  
Asst. United States Attorney.

Received a copy of the within Petition this 2 day of January, 1934.

A. W. NEWMAN,  
JOHN McCUTCHEON,  
Attorney for Plff.

[Endorsed]: Filed Jan. 4, 1934. [17]

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[Title of Court and Cause.]

NOTICE OF APPEAL.

To MARTHA LaFAVOR, as Administratrix of the Estate of CHARLES V. LaFAVOR, deceased, and LUCY ANN LaFAVOR, Plaintiffs, JOHN T. McCUTCHEON and W. A. NEWMAN, Attorneys for Plaintiffs:

YOU, AND EACH OF YOU, will please take notice that the United States of America, defendant in the above entitled cause, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment, decree and order entered in the above entitled cause on October 17, 1933, and that the certified transcript of record will

be filed in the said Appellate Court within thirty days from the filing of this notice.

ANTHONY SAVAGE

United States Attorney.

TOM DeWOLFE

Asst. United States Attorney.

Received a copy of the within Notice of Appeal this 2 day of Jan., 1934.

A. W. NEWMAN

JOHN T. McCUTCHEON

Attorney for Plff.

[Endorsed]: Filed Jan. 4, 1934. [18]

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[Title of Court and Cause.]

ORDER ALLOWING APPEAL.

Upon application of the defendant herein

It is hereby ORDERED that an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment heretofore entered and filed herein on October 17, 1933, be, and the same is hereby allowed.

It is further ORDERED that a certified transcript of the record be transmitted to said United States Circuit Court of Appeals for the Ninth Circuit.

Done at Seattle this 3rd day of Jan., 1934.

EDWARD E. CUSHMAN,

United States District Judge.

Received a copy of the within Order this 2 day of Jan., 1934.

A. W. NEWMAN,  
JOHN T. McCUTCHEON,  
Attorneys for Plff.

[Endorsed]: Filed Jan. 4, 1934. [19]

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[Title of Court and Cause.]

ASSIGNMENTS OF ERROR.

Comes now the United States of America, defendant in the above entitled action, by Anthony Savage, United States Attorney for the Western District of Washington, and Tom DeWolfe, Assistant United States Attorney for said District, and in connection with its petition for an appeal herein and the allowance of the same, assigns the following errors which it avers occurred at the trial of said cause and which were duly excepted to by it at the time of said trial herein, and upon which it relies to reverse the judgment herein.

I.

The District Court erred in denying defendant's motion for a non-suit which motion was made at the close of plaintiffs' case, for the reason and on the ground that the evidence of the plaintiffs failed to make out a prima facie case sufficient to warrant the submission of the issue to the jury, and on the further ground that the plaintiffs' evidence had not

made out a prima facie showing of total and permanent disability within the meaning of the law of disability during the time the insurance sued on was in force and effect; and on the further ground that the evidence [20] adduced affirmatively showed that during the time the insurance sued on was in force and effect, the insured, Charles V. LaFavor, was not totally and permanently disabled, to which denial of motion for non-suit defendant took exception.

## II.

The District Court erred in denying defendant's motion for an instructed verdict at the end of the entire testimony which motion was made for the reason and upon the ground that the evidence of the plaintiffs failed to make out a prima facie case sufficient to warrant the submission of the issue to the jury, and on the further ground that the plaintiffs' evidence had not made out a prima facie showing of total and permanent disability within the meaning of the law of disability during the time the insurance sued on was in force and effect; and on the further ground that the evidence adduced affirmatively showed that during the time the insurance sued on was in force and effect, the insured, Charles V. LaFavor, was not totally and permanently disabled, to which denial of motion for an instructed verdict defendant took exception.

## III.

The District Court erred in denying defendant's petition for a new trial, which denial was excepted

to by the defendant at the time of the interposition of said motion herein.

IV.

The District Court erred in entering judgment upon the verdict herein, as the evidence was insufficient to sustain the verdict or judgment. [21]

V.

The District Court erred in admitting the following testimony of witness Julius Englund over objection of defendant:

Q. Now, you may state what you saw, what you noticed about his appearance that was different than from when you saw him in Camp Lewis, will you state to the jury what you noticed about him that was different?

A. Well, there was quite a difference in him; he was going around limping.

Q. He was limping?

A. Yes.

Q. What else?

A. Complaining about his side.

Mr. DeWOLFE: We move to strike that as hearsay.

The COURT: Overruled.

Mr. DeWOLFE: Exception.

The COURT: Motion denied.

Mr. DeWOLFE: Exception.

The COURT: Allowed.

## VI.

The District Court erred in admitting in evidence the following testimony of witness William Hartwich over exception of defendant:

Q. What were you doing?

A. My brother-in-law and I were digging a well and he came up (as we were interested in getting some water) and he came up to see how the well was coming along and we asked him to look into it; he says, "No. I can't look down."

Mr. WHITLEY: I object to what he said.

The COURT: Objection overruled.

Mr. WHITLEY: Exception.

The COURT: Allowed. [22]

Q. He said on account of what?

A. He said he could not look down the well, he said.

Q. What else?

A. He said his heart bothered him and he didn't dare look down——

Mr. DeWOLFE: We object to that as hearsay.

The COURT: Overruled.

Mr. DeWOLFE: On that point, I would like to have Your Honor reserve the ruling on that for the reason the authorities hold unless the disability claimed—the statements of the insured are not admissible in evidence even on the testimony of the experts unless showing is made that the expert took that history for the purpose



of treating him and not for the purpose of testifying in the trial here—we are deprived of the right of cross-examination. I can produce the authorities at 2:00 o'clock.

The COURT: You may produce them at 2:00 o'clock; the general rule is that a person's statement, explanatory of an act, is not hearsay.

Mr. DeWOLFE: The only case I found that admitted such statements was explanatory of the mental condition of the insured—other cases ruled them out even when taken by a physician.

The COURT: The objection is overruled.

Mr. DeWOLFE: Exception.

The COURT: Allowed.

## VII.

The District Court erred in admitting in evidence plaintiffs' exhibit #11 purporting to be an x-ray of the [23] assured on the ground that said exhibit was not properly identified.

## VIII.

The District Court erred in admitting in evidence plaintiffs' exhibit #12 purporting to be an x-ray of the assured on the ground that said exhibit was not properly identified.

## IX.

The District Court erred in admitting over the objection of the government, the following testimony of witness Bessie Elliott:

Q. Will you just tell the jury how Charles LaFavor acted before and after the blasts were set off?

A. Tell how he acted?

Q. Yes.

A. Well, my husband, he dug holes and set the blast and Mr. LaFavor says "Here's where I am going to get out of here" he says——

Mr. DeWOLFE: (Interrupting) I object to that as self-serving.

The COURT: It seems to be a statement made, accompanying an act as explanatory of the act, objection overruled.

Mr. DeWOLFE: Exception.

The COURT: Allowed.

## X.

The District Court erred in admitting the following testimony of witness Martha M. LaFavor over the objection of the government:

Q. How long would the spells last?

A. They would come on two days before he got them.

Q. Yes?

A. And then when he got through abusing me,——

Q. What did he do?

A. He would lie down and sleep, and when he woke up he said "Where did [24] you get those bruises?" I said, "Don't you know?" and he said he did not know.

Mr. DeWOLFE: I will object to that. There is no mental disability pleaded.

The COURT: Objection overruled.

Mr. DeWOLFE: Exception.

ANTHONY SAVAGE,

United States Attorney.

TOM DeWOLFE,

Asst. United States Attorney.

Received a copy of the within Assignment of Error this 2nd day of Jan., 1934.

A. W. NEWMAN,

JOHN T. McCUTCHEON,

Attorney for Plff.

[Endorsed]: Filed Jan. 4, 1934. [25]

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[Title of Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of the above entitled Court:

You will please certify to the Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, the documents listed below.

1. Third Amended Complaint.
2. Answer to third amended complaint.
3. Reply to defendant's answer to third amended complaint.
4. Verdict.
5. Judgment.
6. Order of September 26, 1933 joining additional party plaintiff.
7. Order of September 30, 1933 allowing defendant's answer to stand as to third amended complaint.

8. Order of October 6, 1933 extending time to lodge bill of exceptions.
9. Motion for new trial.
10. Order of December 11, 1933 denying motion for new trial.
11. Order of December 27, 1933 extending time to lodge bill of exceptions.
12. Petition for appeal. [141]
13. Notice of appeal.
14. Order allowing appeal.
15. Assignment of errors.
16. Citation on appeal.
17. Bill of exceptions.
18. Order of January 16, 1934 re extension of time for bill of exceptions.
19. Minute entry of January 26, 1934 re extension of time for settlement of bill of exceptions.
20. Order of January 30, 1934 extending time to file record on appeal.
21. Minute entry of February 13, 1934 re settlement bill of exceptions.
22. Minute entry of February 16, 1934 extending time to settle bill of exceptions.
23. Minute order of February 16, 1934 extending time to file record on appeal.
24. This praecipe.

ANTHONY SAVAGE,

United States Attorney.

TOM DeWOLFE,

Asst. United States Attorney.

Service acknowledged this 23rd day of February, 1934.

JOHN T. McCUTCHEON,  
Attorney for Plaintiffs.

[Endorsed]: Filed Febr. 24, 1934. [142]

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[Title of Court and Cause.]

CERTIFICATE OF CLERK  
TO TRANSCRIPT.

United States of America,  
Western District of Washington.—ss.

I, Ed. M. Lakin, Clerk of the United States District Court for the Western District of Washington, do hereby certify and return that the within typewritten transcript of record consisting of pages numbered from one to 142 inclusive, are a full, true and correct copy of so much of the record, papers and proceedings in the case of Martha M. LaFavor, Administratrix of the Estate of Charles V. LaFavor, Deceased, and Lucy Ann LaFavor, Plaintiffs and Appellees vs. The United States of America, Defendant and Appellant, cause No. 8120, in said District Court, as required by praecipe of counsel filed and of record in my office in said District Court at Tacoma, Washington, and that the same constitutes the record on appeal from the judgment of said United States District Court for the Western District of Washington to the United States District Court of Appeals for the Ninth Circuit.

I further certify, that attached to this transcript is the original citation in this cause.

I further certify that under separate certificate I am sending the original exhibits as required in order of court made in this cause and of record in this transcript.

I further certify that the following is a full, true and correct statement of all expenses, fees and charges incurred on behalf of the appellant herein for making of the appeal record, certificates and return to the United States Circuit Court of Appeals for the Ninth Circuit, to-wit:

Clerk's fees (Act Feb. 11, 1925) for making record 413 folios @15¢ per folio .....	\$61.95
Appeal fee .....	5.00
Certificate to transcript.....	.50
Certificate to Exhibits.....	.50
	<hr/>
Total .....	\$67.95

I further certify that the amount of \$67.95 has not been collected for the reason that the United States of America, is the appellant.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Tacoma, Washington this 12th day of March, 1934.

[Seal]

ED. M. LAKIN,

Clerk,

By E. W. Pettit,

Deputy. [143]

[Title of Court and Cause.]

CITATION ON APPEAL.

United States of America,  
Western District of Washington,  
Southern Division.—ss.

The President of the United States of America, to  
Martha LaFavor, as Administratrix of Estate  
of Charles V. LaFavor, deceased, and Lucy  
Ann LaFavor, Plaintiffs, and John T. Mc-  
Cutcheon and W. A. Newman, Attorneys for  
Plaintiffs:

YOU, AND EACH OF YOU, are hereby cited  
and admonished to be and appear in the United  
States Circuit Court of Appeals to be held at the  
city of San Francisco, California, in the Ninth  
Judicial Circuit, within thirty days from this date,  
pursuant to an order allowing appeal filed in the  
office of the Clerk of the above entitled Court, ap-  
pealing from the final judgment signed and filed on  
October 17, 1933, wherein the United States of  
America is defendant, and Martha LaFavor, as ad-  
ministratrix of the estate of Charles V. LaFavor,  
deceased, and Lucy Ann LaFavor, are plaintiffs, to  
show cause, if any there be, why the judgment  
rendered against the said appellant as in said order  
allowing appeal mentioned, should not be corrected  
and why justice should not be done to the parties  
in that [144] behalf.

WITNESSETH the Honorable Edward E. Cush-  
man, United States District Judge for the Western

District of Washington, Southern Division, this 3rd day of Jan., 1934.

EDWARD E. CUSHMAN,  
United States District Judge.

Received a copy of the within Citation Jan. 2, 1934.

A. W. NEWMAN,  
JOHN T. McCUTCHEON,  
Attys. for Pltff.

[Endorsed]: Lodged Jan. 4, 1934. [145]

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[Endorsed]: No. 7433. United States Circuit Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Martha La Favor, as Administratrix of Estate of Charles V. La Favor, deceased, and Lucy Ann La Favor, Appellees. Transcript of Record. Upon Appeal from the District Court of the United States for the Western District of Washington, Southern Division.

Filed March 19, 1934.

PAUL P. O'BRIEN,  
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.